EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1712

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

J. W. MARTIN,

Plaintiff in Error,

vs.

GEORGE C. BURFORD, JULES B. CARO, CHARLES E. HOOKER and J. B. CARO, Partners Doing Business Under the Firm Name and Style of J. B. CARO & COMPANY,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit
Court of Appeals

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

J. W. MARTIN,

Plaintiff,

E. M. BARNES, Juneau, Alaska.

versus

GEORGE C. BURFORD, JULES B. CARO, CHARLES E. HOOKER and J. B. CARO, Partners Doing Business Under the Firm Name and Style of J. B. CARO & CO.,

Defendants,

J. A. HELLENTHAL, Juneau, Alaska.

In the District Court for Alaska, Division No. 1, at Juneau.

J. W. MARTIN

vs.

JULES B. CARO, GEO. C. BURFORD, CHARLES E. HOOKER and J. B. CARO and CHARLES E. HOOKER, Partners Under the Firm Name and Style of J. B. CARO & CO.

Praecipe [for Transcript of Record].

To the Clerk:

You will please prepare record as follows for transmittal to the U. S. C. C. A., 9th Circuit:

This praecipe;

Complaint;

Answer;

Reply;

Motion to make answer more definite and certain;

Order sustaining motion to make answer more definite and certain;

Demurrer to defts. affirmative answer;

Order overruling plffs. demurrer to deft. affirmative answer;

Order May 2d, 1908, extending time for filing bill of exceptions;

June 19, stipulation extending time for filing bill of exceptions;

June 19, Order extending time for filing bill of exceptions;

Judgment;

Assignment of errors;

Supplemental assignment of errors;

Bill of exceptions;

Petition for writ of error;

Original writ of error;

Bond on error;

Original citation;

Afft. of service of writ of error and citation.

In transcribing the journal entries, and all papers after the complaint, please head them "Same Court—Same Cause."

Juneau, March 22d, 1909.

Respectfully,

E. M. BARNES,

Atty. for Plff.

No. ——. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. Geo. C. Burford et al., Defendant. Praecipe. E. M. Barnes, Attorney for Plff. Office: Rooms, 7, 8,

Lewis Block, Juneau, Alaska. Filed Mar. 22, 1909. C. C. Page, Clerk. By R. E. Robertson, Asst.

District Court for the District of Alaska, Division No. 1, at Juneau.

No. 572-A.

J. W. MARTIN,

Plff.,

vs.

GEO. C. BURFORD, JULES B. CARO, CHARLES E. HOOKER, and J. B. CARO *and Partners,* Doing Business Under the Firm Name and Style of J. B. CARO & CO.,

Defts.

Complaint.

And now comes plff. and for cause of action against defts. alleges:

I.

That on the 28th day of Aug., 1905, he paid to defts. the sum of two thousand dollars, as is evidenced by the receipt of defts. herein following, and for the property named in said receipt, which said receipt is in words and figures following, to wit:

Know all men by these presents: That we, George C. Burford and J. B. Caro & Company, of the town of Juneau, District of Alaska, for and in consideration of the sum of two thousand ($2,000.00) dollars, to us in hand paid, receipt whereof is hereby acknowledged, do hereby sell, transfer and assign unto J. W.

Martin, of the town of Haines, Alaska, one-third (1-3) interest in and to the following-described property, to wit:

One scow "Skagitt," her lines, gear, etc.; one scow "Volunteer," her lines, gear, anchor, etc.; one log-float; seine-boat and seines; seines; sale barrels; tierces; salmon troughs; and one store building and site situated at Farragut Bay, Alaska, together with all things pertaining to the fishing outfit known as the "Arctic Fishing & Packing Company"; except the launch "Tillicum," which said launch is hereby expressly reserved.

And the said parties of the first part hereby covenant that they are the owners and entitled to sell the said one-third interest of all of the above-described property, which said property is known as the said "Arctic Fishing & Packing Company" and set over the same to the said second party.

In testimony whereof we have hereunto set our hands and seals this 28th day of August, 1905.

GEORGE C. BURFORD [Seal]
J. B. CARO & CO. [Seal]
By CHAS. E. HOOKER,
J. B. CARO.

Signed, sealed and delivered in presence of
C. A. MacGREGOR,
L. B. FRANCIS.

II.

That in order to induce plff. to make said payment the defts., and each of them, wantonly and falsely represented in said writing to plff. that they owned

the store building and site as named in said writing and were entitled to sell the same.

III.

That said last-named statement, and the whole thereof, was wilfully false and was wantonly made by said defts., and each of them, and was acted on by this plff. in the belief of its truth, and at the time of making it it was known by said defts. and each of them to be false, and was made by said defts., and each of them, with intent to deceive this plff., and this plff. thereby suffered injury, to wit, the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts. Plff. was at the time wholly ignorant of the truth or falsity of said statements, but believed the same to be true, and at the time plff. had no means of learning the truth or falsity of said statement. Plff. would not have paid said sum of $2,000, or any part thereof, had it not been for plff's. belief in the truth of said statement.

IV.

Defts., nor either of them, at any time ever had any title or ownership, or were they or either of them ever the owners or in possession of said store building or site, nor were they or either of them ever entitled to sell the same, nor have they now such title or ownership or possession, or so entitled to sell.

V.

That by said false statements of defts., as aforesaid, plff. has been damaged in the sum of $2,000.

VI.

That plff. claims as exemplary damages in the sum of $1,000.

Wherefore, plff. prays judgment against defts. and each of them in the sum of $3,000, and for his costs and disbursements herein expended.

E. M. BARNES,
Atty. for Plff.

United States of America,
District of Alaska,—ss.

I, J. W. Martin, being first duly sworn, on oath say: That I am the plff. in the above-entitled action; that I have read the foregoing complaint and know the contents thereof, and believe the same to be true.

J. W. MARTIN.

Subscribed and sworn to before me this 22d day of November, 1906.

[Seal] GUY McNAUGHTON,
Notary Public for Alaska.

No. 572-A. District Court for the District of Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro et al., Defendants. Complaint at Law. Filed Nov. 11, 1906. C. C. Page, Clerk. By A. L. Collison, Deputy. E. M. Barnes, Attorney for Plff. Office: Juneau, Alaska, Valentine Building.

[Same Court—Same Cause.]

Answer of J. B. Caro.

Comes now the defendant, Jules B. Caro, and answering for himself alone, admits, denies and alleges as follows:

I.

1. This answering defendant denies that plaintiff paid to him or to all or any of his codefendants herein, or at all, the sum of two thousand dollars ($2,000.00), or any other sum or sums whatsoever, except as hereinafter stated.

2. Denies that he ever executed or delivered to the plaintiff the writing referred to in plaintiff's complaint as a receipt, and further, that he or any of his codefendants wantonly or falsely, or at all, represented to the plaintiff that they or any of them owned a store building and site referred to in said writing in said complaint alleged.

3. This defendant, further answering, denies each and every allegation in paragraph three (3) of said complaint.

4. This answering defendant further denies each and every allegation in the fourth paragraph of plaintiff's complaint contained.

5. Answering defendant further denies that the plaintiff has been damaged in the sum of two thousand dollars, or in any other sum whatsoever, and denies that the said plaintiff is entitled to the sum of one thousand dollars, or any other sum, as exemplary damages herein.

II.

And the defendant J. B. Caro, further answering for himself herein, and by way of affirmative defense, alleges:

1. That on or about the 28th day of August, 1905, and prior thereto, the defendant George C. Burford

was the owner of a certain fishing outfit consisting of the scow "Skagitt," her lines, gear, etc.; the scow "Volunteer," her lines, gear, etc.; one log-float, seine-boat and seines, salt, barrels, tierces, trawls, together with other articles pertaining to the said outfit, which said fishing outfit was formerly owned by the Arctic Fishing & Packing Company; that at said time the said George C. Burford also had an option of a certain store building and site at Farragut Bay, in Southeastern Alaska;

2. That on or about the said 28th day of August, 1905, the said George C. Burford sold to the plaintiff a one-third interest in and to the entire fishing outfit aforesaid, save and excepting a certain launch called the "Tillicum," which had formerly belonged to said outfit, for which interest the plaintiff then and there agreed to pay the said George C. Burford the sum of two thousand dollars; and the said George C. Burford then and there agreed, after explaining in full to the plaintiff all the details in connection with his said option hereinbefore referred to upon said store building and at Farragut Bay, to exercise and take up the said option, and to convey a one-third interest in the property covered thereby as a part of the outfit so purchased by the plaintiff for the said sum of two thousand dollars; that before said purchase was made the said George C. Burford fully and fairly explained to the plaintiff that he merely held an option on said site and building at Farragut Bay, but agreed with the plaintiff nevertheless to exercise his said option as aforesaid, and that the plaintiff should become the owner of a one-third interest in

and to the property covered thereby upon the exercise thereof and with that understanding, and without the concealment of any of facts by said Burford from the plaintiff, but upon a full and fair understanding and agreement upon all the facts in connection with said purchase as hereinbefore stated, the said Burford sold to the said plaintiff a one-third interest in and to the fishing outfit and option property aforesaid for the said sum of two thousand dollars, and executed to the plaintiff the bill of sale, copy of which is set out in the complaint herein.

3. That the firm of J. B. Caro & Co., consisting of the said Charles E. Hooker and Jules B. Caro, were at one time interested in a copartnership doing business as the Arctic Fishing & Packing Co., and that the signature of said firm was affixed to the bill of sale aforesaid by the said Charles E. Hooker for no purpose except to convey to the plaintiff whatever interest said firm might still have in the outfit conveyed, by reason of their former ownership and interest in and to the said Arctic Fishing & Packing Co., and for no other further or different purpose whatsoever, all of which was well known and understood by the plaintiff at the time of the execution of the said bill of sale, and he, the plaintiff, well knew at that time that the signature of the said firm of J. B. Caro & Company was affixed for no other purpose.

4. This defendant, further answering, says that he never signed said document or bill of sale referred to in the complaint herein, and never authorized his name to be signed to the same as an individual, but

that his name, as appears on said bill of sale, is and appears only as a member of the said firm of J. B. Caro & Company, and was affixed by his said partner, Charles E. Hooker, as above narrated, and not otherwise.

5. That the plaintiff J. W. Martin agreed to pay for his one-third interest in and to said fishing outfit, store building and site the sum of two thousand dollars to the said George C. Burford, a small portion of which said sum was then and there paid in cash, and the balance in notes of hand of the plaintiff; that immediately after the plaintiff had so purchased said interest in said outfit, said outfit in charge of the said George C. Burford proceeded at said Farragut Bay with the fishing business as contemplated by the parties interested therein, including the plaintiff, and after losing considerable time and expense in an attempt so to do, was finally compelled, by storm and heavy seas, to put into Wrangell Narrows for shelter and to save said outfit damage; that in the meantime it was also learned for the first time by the said George C. Burford that the Pacific Coast Steamship Company, a common carrier of freight in the District of Alaska, and upon whose ships the parties of said fishing venture expected to ship the fish taken in said venture at Farragut Bay to the markets at Seattle, Washington, would not call in at Farragut Bay for the fish so taken, thus making it impracticable and impossible to carry on said fishing business at said Farragut Bay at a profit.

6. That a short time thereafter, the said plaintiff and the said George C. Burford entered by parol into

a new and different agreement and settlement concerning their interests in said outfit, which said agreement and settlement was made necessary by reason of the circumstances above narrated; and it was then and there agreed by and between the said George C. Burford and the said plaintiff that they would abandon the Farragut Bay project, and continue in the fishing business at Wrangell Narrows, and that the said Burford should not exercise said option in the purchase of the said store building and site at said Farragut Bay, but that the said plaintiff should nevertheless hold his said one-third interest in and to said fishing outfit above referred to with the exception of the said building and site, which was and had been valued by the said partners to be of no greater worth or value than the sum of two hundred and fifty dollars ($250.00), and that from then henceforth they were to be partners in the fishing outfit aforesaid with the exception of said site in the following proportions, that is to say: That the said George Burford should own a two-thirds interest therein, and the plaintiff should own a one-third interest therein, and that, in consideration of the fact that the said Farragut Bay project should and had been abandoned and the said Burford should not be compelled to exercise his option thereon and convey to the plaintiff an interest in and to said building and site aforesaid; that the said plaintiff should be relieved from the payment to the said George C. Burford of a certain promissory note in the sum of five hundred dollars ($500.00) theretofore given by the plaintiff as part of the purchase price of two thousand dollars as

aforesaid, and that whereas such new and different agreement was made and entered into at or near Petersburg, Alaska, and said promissory note had been left by the said Burford at Juneau, Alaska, for safekeeping, the said Burford then and there gave to the plaintiff his certain writing wherein it was stated that said note was canceled, and should not be presented for payment in consideration of the fact that the plaintiff would not demand a one-third interest in and to the said Farragut Bay site as hereinbefore referred to, and other considerations therein named; and that thereupon all differences existing by and between the said parties were settled and adjusted.

7. That the said George C. Burford now is, and at all times mentioned herein was, willing and ready to deliver and surrender the said note of $500 of the plaintiff, to plaintiff, and was and has been prevented from so doing by reason of the fact that the said note was at said time left by him at Juneau for safekeeping and was not accessible at said time for cancellation, and is ready and willing at any time to surrender the same to the plaintiff, and has never presented the same for payment, but has in all respects complied with and carried out the terms and conditions of said settlement and adjustment; that the value of the said Farragut Bay site and store was never any greater than the said sum of two hundred and fifty dollars ($250.00), but that owing to the fact that losses had been incurred in said venture and all of the parties interested had lost money on the same, the

said George C. Burford made the liberal settlement and adjustment with the plaintiff above referred to and canceled said note of the plaintiff for $500 so held by him, upon the considerations herein stated.

Wherefore, this answering defendant prays that plaintiff's action be dismissed and that he recover nothing by reason thereof, and that the defendant have his costs and disbursements in this behalf expended.

J. A. HELLENTHAL,
Attorney for J. B. Caro.

United States of America,
District of Alaska,—ss.

Jules B. Caro, being first duly sworn according to law, deposes and says that he is the answering defendant in the above-entitled cause of action; that he has read the foregoing answer and knows the contents thereof, and that the same is true as he verily believes.

JULES B. CARO.

Subscribed and sworn to before me this 18th day of April, 1907.

[Notarial Seal] GUY McNAUGHTON,
Notary Public in and for Alaska.

Receipt of copy and due service of the within answer admitted this 18th day of April, 1907.

_____,
Attorney for Plaintiff.

#572. No. 572. Original. In the District Court for the District of Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. George C. Burford et al.,

Defendants. Answer of Jules B. Caro. Filed Apr. 18, 1907. C. C. Page, Clerk. By E. W. Pettit, Asst. J. A. Hellenthal, Attorney for Defendant, Jules B. Caro. Office: Juneau, Alaska.

[Same Court—Same Cause.]

Reply.

And now comes plff. and for reply to defts.' affirmative matter set up in their answer herein:

Denies each and every allegation thereof.

Wherefore, plff. prays the prayer of this complaint herein be granted.

E. M. BARNES,
Atty. for Plff.

United States of America,
District of Alaska,—ss.

I, J. W. Martin, being first duly sworn, on oath say: That I am the plff. in the above-entitled action; that I have read the foregoing reply and know the contents thereof, and believe the same to be true.

J. W. MARTIN.

Subscribed and sworn before me this 7th day of August, 1907.

[Notarial Seal] W. B. STOUT,
Notary Public for Alaska.

No. 572-A. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro, et al., Defendant. Reply. Filed Aug. 12, 1907. C. C. Page, Clerk. By R. E. Robertson, Asst. E. M. Barnes, Attorney for Plff. Office: Juneau, Alaska. Rooms 1 and 2 Valentine Building.

[Motion to Make More Definite, etc.]

[Same Court—Same Cause.]

And now comes plff. and moves that deft. Caro makes more definite and certain his affirmative *dense* herein in this:

In par. 2 thereof how he explained to plff., whether in writing or otherwise, the details therein mentioned, and in par. 6 thereof whether the agreement named therein was in writing or otherwise.

E. M. BARNES,
Attorney for Plff.

Due service of a copy of the within is admitted 1st day of May, 1907.

J. A. HELLENTHAL,
Attorney for Deft.

No. 572. District Court, for the District of Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. Geo. C. Burford et al., Defendant. Motion to make Defts., Affirmative Answer More Definite and Certain. Filed May 1, 1907. C. C. Page. By E. W. Pettit, Asst. E. M. Barnes, Attorney for Plff. Office: Juneau, Alaska, Valentine Building.

[Same Court—Same Cause.]

Order Allowing Amendment to Answer by Interlineation, etc.

Now, on this day, this matter coming on for hearing upon the motion of plaintiff to make the answer more definite, the plaintiff appearing by E. M.

Barnes, Esq., and the defendants appearing by J. A. Hellenthal, Esq., and after argument had and the Court being fully advised in the premises grants said motion, and the defendant is given three days in which to amend said answer by interlineation.

(Tuesday, June 4, 1907, Civil Journal E, page 199.)

JAMES WICKERSHAM,
Judge.

[Demurrer to Defendants' Affirmative Answer.]

[Same Court—Same Cause.]

And now comes plff. and demurs to defts. affirmative answer herein for this: said affirmative answer does not state facts sufficient to constitute a defense herein.

E. M. BARNES,
Atty. for Plff.

No. 572-A. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro, et al., Defendant. Demurrer of Defts. Affirmative Answer. Filed Jun. 26, 1907. C. C. Page, Clerk. By ———— Deputy. E. M. Barnes, Attorney for Plff. Office: Juneau, Alaska, Rooms 1 and 2 Valentine Building.

[Same Court—Same Cause.]

Order Overruling Plaintiff's Demurrer.

Now, on this day, this matter coming on for hearing on plaintiff's demurrer herein, it is ordered that the said demurrer be overruled and that 30 days be given to reply.

(Saturday, June 29, 1907, Civil Journal E, page 321.)

JAMES WICKERSHAM,
Judge.

[Same Court—Same Cause.]

Order [Dated July 1, 1907] Overruling Demurrer.

This matter coming on regularly to be heard on this 28th day of June, A. D. 1907, upon the demurrer of the plaintiff to the answer of the defendants herein, and the Court being fully advised in the premises overrules said demurrer, and the plaintiff is given thirty days from the 1 day of July, 1907, in which to file a reply herein; to which order and ruling of the Court in so overruling the demurrer of the plaintiff, the plaintiff by his counsel then and there excepted and exception was by the Court allowed.

Done in open court this 1 day of July, 1907.

By the Court:

JAMES WICKERSHAM,
Judge.

No. 572-A. Martin vs. Burford. Order filed Jul. 1, 1907. C. C. Page, Clerk. By R. E. Robertson, Asst.

[Same Court—Same Cause.]

Order Extending Time to File Bill of Exceptions and Staying Execution.

Now, on this day, upon the application of E. M. Barnes, Esq., counsel for the plaintiff herein, good cause being shown therefor, it is ordered that the

time for filing plaintiff's bill of exceptions herein be and it is hereby extended sixty days from date and that execution be stayed until the expiration of that period.

(Saturday, May 2, 1908, Civil Journal F, page 141.)

ROYAL A. GUNNISON,
Judge.

[Same Court—Same Cause.]

Stipulation [Extending Time for Filing of Bill of Exceptions, etc.].

It is hereby stipulated by and between the respective parties hereto that the plaintiff have until September 2d, 1908, in which to settle and file a bill of exceptions herein, and in the meantime execution be stayed.

E. M. BARNES,
Attorney for Plaintiff.
J. A. HELLENTHAL,
Attorney for Defendants.

No. 572. Dist. Court, Dist. of Alaska, Div. No. 1, at Juneau. J. W. Martin vs. Geo. C. Burford, et al. Stipulation Extending Time For Settling and Filing Bill of Exceptions. Filed Jun. 19, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy.

[Same Court—Same Cause.]

Order Extending Time for Filing and Settling Bill of Exceptions.

On reading and filing the stipulation of counsel herein, it is ordered that the time for settling and filing the bill of exceptions herein be extended until Sep. 2d, 1908, and that in the meantime execution be stayed.

Done at Chambers this 16th day of June, 1908.

ROYAL A. GUNNISON,
Judge.

No. 572-A. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. Geo. C. Burford, et al., Defendant. Order Extending Time for Settling and Filing Bill of Exceptions. Filed Jun. 19, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. E. M. Barnes, Attorney for Plff. Office: Juneau, Alaska, Rooms 1 and 2, Valentine Building.

[Same Court—Same Cause.]

Judgment.

This cause came on regularly for trial on the 20th day of February, 1908, all parties being present in person and by counsel, and the jury having been duly and regularly empanelled and sworn to try the issues herein, and both parties, plaintiff and defendant, having adduced the evidence on their respective sides, and arguments of counsels having

been made, the jury having returned a verdict wherein they found for the defendants generally, and the motion for a new trial having been heretofore made, which said motion for a new trial has been by the Court, upon due consideration, overruled, now, therefore, it is ordered, adjudged and decreed that judgment be and is hereby entered in favor of the defendants and against the plaintiff for the defendants' costs and disbursements in this behalf incurred, taxed at ———— dollars, and further, that the plaintiff's complaint to the same is hereby dismissed, and that he take nothing by reason thereof, and it is further ordered that the plaintiff be given sixty (60) days from the date hereof in which to prepare and present his bill of exceptions, and that in the meantime, during said sixty days, execution be stayed.

Done in open court this 23d day of March, 1908.

ROYAL A. GUNNISON,

Judge.

O. K.—E. M. B.

Original. No. 572-A. In the District Court for the District of Alaska, Division No. 1. J. W. Martin, Plaintiff, vs. George C. Burford, et al., Defendant. Judgment. Filed Mar. 23, 1908. C. C. Page, Clerk. By R. E. Robertson, Asst. J. A. Hellenthal, Attorney for Office: Juneau, Alaska.

[Same Court—Same Cause.]

Assignment of Errors.

At the trial of said cause the following testimony was given by J. W. Martin, the plff.:

Direct Examination.

Mr. BARNES.—Q. Will you give your name to the reporter? A. J. W. Martin.

Q. Where do you reside?

A. Haines, Alaska.

Q. Where were you residing during the month of August, 1906? A. In the same place.

Q. What is your business?

A. General merchandise.

Q. What was your business at that time?

A. The same.

Q. On or about the 28th day of August, 1906, I will ask you to state whether or not you had any business dealings with the defts. in this case?

A. I had.

Q. State whether or not that dealing was represented by an instrument in writing.

A. Yes, sir.

Q. I will ask you to show it to me.

Witness produces paper, being bill of sale. Marked for identification Plaintiff's Exhibit No. 1.

Q. I would ask you to tell the jury if you know the signature of those parties?

A. Yes, sir; I do.

Q. Read to the jury whose those signatures are.

A. George C. Burford, J. B. Caro & Co., by Chas. E. Hooker, J. B. Caro.

Q. I understand you to say that is the signature of Mr. Caro? A. Yes, sir.

Plaintiff's Exhibit for Identification No. 1 offered in evidence by counsel for plaintiff. No objection. Received in evidence and read to the jury as follows:

Know all Men by These Presents: That we, George C. Burford & J. B. Caro & Co. of the town of Juneau, District of Alaska, for and in consideration of the sum of Two Thousand ($2000.00) dollars, to us in hand paid, receipt whereof is hereby acknowledged, do hereby sell, transfer and assign unto J. W. Martin, of the town of Haines, Alaska, one-third (1/3) interest in and to the following described property, to wit:

One scow, "Skagitt," her lines, gear, etc.; one scow "Volunteer," her lines, gear, anchor, etc.; one log-float; seine-boat and seines; salt, barrels, tierces, salmon troughs, and one store building and site situated at Farragut Bay, Alaska, together with all things pertaining to the fishing outfit known as the "Arctic Fishing & Packing Co."; except the Launch "Tillicum," which said launch is hereby expressly reserved.

And the said parties of the first part hereby covenant that they are the owners and entitled to sell the said one-third interest of all the above-described property, which said property is known as the said "Arctic Fishing & Packing Co." and set over the same to the said second party.

In testimony whereof: We have hereunto set our hands and seals this 28th day of August, A. D. 1905.

By CHAS. E. HOOKER,

J. B. CARO.

GEORGE C. BURFORD. [Seal]

J. B. CARO & CO. [Seal]

Signed, sealed and delivered in the presence of:

C. A. MacGREGOR,

L. B. FRANCIS.

United States of America,
District of Alaska,—ss.

This is to certify that on this 28th day of August, A. D. 1905, before me, the undersigned, a Notary Public in and for the District of Alaska, personally appeared George C. Burford and Chas. E. Hooker, of the firm of J. B. Caro & Company, the parties mentioned in the foregoing instrument, and acknowledged to me that they signed the same as their free and voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Notarial Seal] L. B. FRANCIS,

Notary Public for Alaska.

[Endorsed as follows]: Bill of Sale from J. B. Caro & Co. and Geo. C. Burford, to J. W. Martin.

Mr. BARNES.—Q. I would ask you, Mr. Martin, how much, if anything, you paid to the defts. on that agreement? A. $2,000.00.

Q. Do you recognize that note? (Showing witness note.) A. Yes, sir.

Q. Now, I would ask you if that note is a part of the $2,000.00 that you refer to? A. It is.

Q. And if that note is returned to you and surrendered into your possession, then I ask you how much you have paid to the defts. in money?

A. $1500.00.

Q. Will you tell the jury how you came to pay that money to the defts.?

A. It was paid solely on the representation that they owned this site at Farragut Bay.

Q. Now, have you ascertained whether that statement was true or false?

A. It proved to be false.

Q. At the time it was made, tell the jury whether or not you had any knowledge of its truth or falsity?

A. I had no knowledge—no way of gaining any knowledge.

Q. Tell the jury whether you believed the statement that was made to be true.

A. I believed it to be true.

Q. Now, I would ask you, Mr. Martin, to state to the jury whether or not if you had any doubts as to the truth of these statements you would have paid this sum of $2,000.00 or any part thereof?

A. I certainly would not.

Q. And you have already stated that the statement that they made to you was false, haven't you?

A. Yes, sir.

Q. How much damages do you claim, provided that the note is returned to you, that $500.00 note?

A. $2,500.00.

Q. And of what does that consist, Mr. Martin? How much compensation for the loss you have sustained do you desire? A. $1,500.00.

Q. Then how much damages as exemplary damages do you ask? A. $1,000.00.

Q. Making altogether $2,500.00 instead of the $3,000.00 asked when you first filed the complaint?

A. Yes, sir.

On cross-examination deft. asked the witness Martin, "You never had any talk with Geo. Burford and Chas. Hooker about George having an option on that property?" To which plff. objected on the ground that it was not cross-examination.

Objection overruled. Plff. excepts, and the witness answered "No, sir." And which ruling plff. assigns as error.

The deft. further asked of the witness, "George Burford didn't tell you in Caro & Co.'s office in the presence of Chas. Hooker, all about this Farragut Bay property, telling you that he had an option on it for $225.00, did he?" Objected by plff. as not cross-examination. Objection overruled and plff. excepts. And which ruling plff. assigns as error.

The deft. further asked of the witness Martin, "How much did you calculate that site for, Mr. Martin, as being worth in making up your estimate of the property that was being conveyed to you at that time?"

Mr. BARNES.—To which we object as immaterial. There is no value alleged by them as to any property. The only value that is alleged in the complaint or answer is the value which this property

had, which was $250.00 or less. They cannot come in now and endeavor to establish what his opinion of the value was, because they have not alleged that there was a value to it, and if there was a value to it they should of alleged it. Why didn't they say that *that* tierces and barrels and, etc., were worth so much and the seines were worth so much, and so on? I say now that they cannot come in and show a value to exist which does not exist in the pleadings.

The COURT.—If I remember the testimony in reply to one of your questions, I think the witness said that the price paid was for this property something to that effect, and that was the reason for the payment because they had this property. That opens the door to cross-examination as to his estimate of the value of that property.

Mr. BARNES.—Which property?

The COURT.—I understand your question to refer to the property at Farragut Bay.

Mr. BARNES.—The house and lot, if you please.

The COURT.—Yes.

Mr. BARNES.—If we had sued for misrepresentation of the value, the question would be pertinent. We didn't, and the pleadings admit that it was worth $250.00, and that is the end of it. While we might have brought suit on that ground, we didn't do it. We simply brought this suit that they sold us the property and they didn't have any title to the property, which the law says we are entitled to bring, and that we paid $1500.00 for that property.

The COURT.—Referring to the property at Farragut Bay, not the floating property.

Mr. BARNES.—The floating property is valueless under the pleadings.

Objection overruled, and the witness answered, "We had not figured on any definite value."

The deft. further asked the witness Martin, "Didn't you get an interest in any outfit from Geo. Burford?"

Mr. BARNES.—To which we object. The bill of sale is the best evidence and that does not say that he got it. They simply assigned and set it over to him. And the bars were not let down for that.

Objection overruled and plff. accepts, and which ruling plff. assigns as error. And the witness answered, "Yes, sir, I was supposed to get an interest in this fishing outfit."

The defts. asked the witness Martin, "You got everything except that Farragut Bay site, didn't you?" A. No, sir.

Q. What else didn't you get?

A. I didn't get anything as it was represented.

Q. You didn't? How was it represented to you?

Mr. BARNES.—We object because it is they that brought this out in the cross-examination and it is represented in the bill of sale.

Objection overruled and plff. accepts, and which ruling plff. assigns as error.

The deft. further asked the witness Martin, "You made a mistake in buying the scow?"

Mr. BARNES.—We object to that. We are not complaining about this scow. Suppose it was worthless, supposing he did make a mistake, he wanted that site to start business in. That is why

he paid this money. He is a merchant; he is not a ship man; he wanted to buy this store building so as to start another store. The pleadings show that these things were absolutely worthless, no value on them at all; hence the question is immaterial. And this ruling plff. assigns as error.

Objection overruled and plff. excepts and the witness answered, "Well, yes, it proved to be worthless. Of course we didn't place any special value on it but what little value there might have been considered to be on it at the time proved to be of no value."

The defts. asked the witness Martin, "Did you ever get an invoice from Mr. Burford, or statement that was made out at that time enumerating all these items set out in this bill of sale and placing a valuation on each?"

Objected to by plff. as not proper cross-examination. Objection overruled and plff. excepts. And which ruling plff. assigns as error.

The defts. further asked of the witness Martin, "Did you pay all of the money that you paid defts. just merely for the Farragut Bay site?"

Plff. objected because it was not cross-examination. Objection overruled and plff. excepts. And which ruling plff. assigns as error.

And the witness answered, "Yes, sir, solely for that purpose. The other part of the outfit didn't cut any ice in the matter, as I looked at it."

The defts. asked the witness, "Q. These other items enumerated in this bill of sale had nothing to

do with the question of your paying this money at all, did they?"

A. They were valueless, the rest of them.

Q. They were put in there to make it look good?

To which plff. objected on the ground that the record was the best evidence. Objection overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "Yes, sir, that is the only purpose I can figure on the proposition."

Q. The deft. further asked the witness, "How many things enumerated in this bill of sale did you see before you made the purchase?

Objected to by plff. as not proper cross-examination. Objection overruled and plff. excepts. And this ruling plff. assigns as error.

The defts. further asked the witness Martin, "Q. Did you ever ask George about these other items enumerated in this bill of sale, besides the Farragut Bay property?"

Mr. BARNES.—We object to that question. Their answer sets up that fact and they are trying to make our witness testify and substantiate their answer. Their answer sets up that certain articles were missing, and because they were missing they had another settlement afterward that is part of their case. And the question is immaterial.

Objection overruled and plff. excepts. And this ruling plff. assigns as error.

Defts. further asked the witness, Martin, "Q. Did you pay $2000.00 for one-third interest in that property at Farragut Bay?"

Plff. objected on the grounds that the bill of sale was the best evidence. Hence the question incompetent. Objection overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "That was the consideration; the rest of this outfit was of minor value."

The defts. further asked the witness Martin, "Did you make any inquiries with reference to Mr. Burford's ownership, or the ownership of the other defts. to this property"?

Mr. BARNES.—We object, the law does not require him to make any inquiries.

Objection overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "No, sir, I think not; I took Mr. Hooker and Mr. Burford's word in the matter."

The defts. further asked the witness, "Didn't Mr. Hooker also tell you that they had titles"?

Mr. BARNES.—We object to that because it is in paper-writing here, which he is not permitted to deny or anybody else, that they alleged they did have titles, and they are not permitted to come in and change the statement that they made in writing and all previous negotiations and verbal statements are merged in this written contract. Hence the questions, incompetent.

Objections overruled and the plff. excepts. And this ruling plff. assigns as error.

Q. The defts. further asked the witness Martin. "Did you ever go to the records here to examine the title to that property or did any one go for you?"

Mr. BARNES.—We object to that on the ground that it is immaterial. The law expressly says that he didn't have to.

The COURT.—Objection overruled and the plff. excepts. And this ruling plff. assigns as error. And the witness answered, "I think not. I relied on their word."

Deft. further asked, "Mr. Martin, you didn't, while these negotiations were pending before the execution of this bill of sale, go to Farragut Bay, did you?"

Plff. objected to the question on the grounds that it was immaterial. Objection overruled and the plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "No, sir."

The deft. further asked the witness Martin, "Q. Isn't it a fact that you were not to have any interest in that store business at all, that Caro & Co. were to have whatever business there was there, and wasn't that your agreement with Caro & Hooker?"

To which plff. objects on the ground of incompetency. The records being the best evidence. Objection overruled and plff. excepts. And this ruling plff. assigns as error. And the witness answered, "There was no agreement to that effect at all."

The deft. George Burford was called as a witness by defts. and was asked the question, "What, if any dealings, did you have with the plff. at that time, Aug., 1905?"

Plff. objected to his stating his dealings on the ground that all their talk and all their actions were embodied in the bill of sale, and they cannot now

come in by parol evidence endeavor to explain them away by anything that may have transpired before that writing was made; hence it is incompetent. And it comes under the allegations in the answer of which we made a motion and to which it was held by this Court that those dealings must be told to us whether they were in writing or by parol, and they didn't do it, so they are precluded from testifying.

Objection overruled and the plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "At that time we took up the matter of fishing. We were talking of the fishing business, and I explained to him the proposition that I had."

The deft. further asked the witness, "What, if any, conversation did you have with Mr. Martin at that time when you and Mr. Hooker were present, with relation to this fishing business, Mr. Caro being in San Francisco?"

To which plff. objected because it appears that it was not the time he signed the agreement; it was another time and another transaction; hence is incompetent.

Objection overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "Well, we stated this, that I held an option on the Farragut Bay property."

The deft. further asked the witness, "Q. What conversations or dealings were had between you and Mr. Martin touching the question as to whether he

paid all the money for the store property or part for the other property?"

The COURT.—State any conversation with relation to the price paid by Mr. Martin and what it was paid for for the buildings or for the outfit.

Objected to by plff. as not tending to prove any issue raised by the pleadings. Objection overruled and plff. excepts. And this ruling plff. assigns as error. And the witness answered, "I told Mr. Martin the price I wanted for one-third interest in the Arctic Fishing and Packing Co., the company I was interested in."

Plff. moved to strike the answer because it does not seem to be the property described in the bill of sale belonging to Caro & Co. and Burford. The Arctic Packing and Fishing Co. did not sign the bill of sale.

Motion overruled and plff. excepts. And this ruling plff. assigns as error.

The deft. further asked the witness, "Q. Was there any conversation or agreement between you and Mr. Martin at which you placed a valuation on these different items that went into this transaction?"

Plff. objects because it tends to prove no issue raised by the pleading no value being pled.

Objections overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "Mr. Martin asked me the valuation of the different things."

The defts. further asked the witness, "How about (the value) of the Farragut Bay property?" To

which plff. objected on the ground that it tended to prove no issue raised by the pleadings.

Objection overruled and plff. excepts. And this ruling plff. assigns as error and the witness answered, "He asked me about the Farragut Bay property and I told him it was valued at about $250.00."

The COURT.—Whatever you said to him—let us have it.

A. I told Mr. Martin everything that was on that scow because I had the stock invoice there and he had it on his lap and was reading it over.

Mr. HELLENTHAL.—Q. What about the stock-book now?

Objected to by plff. as not tending to prove any issue raised by the pleadings. Objection overruled and plff. excepts. And this ruling plff. assigns as error.

The deft. asked the witness Burford, "Q. Now, what conversation did you have, if any, with Mr. Martin with reference to going into the mercantile business down there?"

To which plff. objected on the ground of immateriality, their only allegation being that they went into the fish business.

Objection overruled and plff. excepts. And this ruling plff. assigns as error.

The deft. further asked of the witness, "Q. Did you, acting for the defts. in this case, have any subsequent agreement with Mr. Martin?"

The witness answered, "I did, sir."

Q. Mr. Burford, I hand you here a paper marked Defts. Exhibit "E," for identification, and offer it in evidence.

To which the plff. objected on the ground that it does not tend to prove any issue raised by the pleadings. The issue raised by the pleadings is, that this settlement was in writing and in that settlement he agreed that he would "not demand a one-third interest in and to the said Farragut Bay site, as heretofore referred to." It is immaterial because the inventory was a copy from the stock-book, and in the stock-book this witness who made the inventory says that the Farragut Bay property was not invoiced, was not in that book. Consequently it can in no instance refer to the Farragut Bay property.

Objection overruled and plff. excepts. And this ruling plff. assigns as error.

The witness had previously testified as follows:

The COURT.—Q. There was not anything in your stock-book of the site, of the Farragut Bay site?

Q. No, sir. That was the stock-book of the Arctic Fishing and Packing Co.

And in response to the question admitted by the Court last above spoken of the paper was read to the jury as follows:

Petersburg, Dec. 15, 1905.

I, the undersigned, this 15th day of Dec., 1905, cancel a note of $500 made in favor of Arctic Fishing and Packing Co. and signed J. W. Martin, dated Aug. 28th, 1905, to run 4 months. This is in accordance with understanding the aforesaid parties had, as certain articles were missing from original in-

voice. The cancellation of this note is to make right these said missing articles.

[Signed] ARCTIC FISHING & PACKING CO. [Seal]

[Signed] GEORGE C. BURFORD.

The deft. further asked the witness Burford, as follows: "Q. What were the conversations had between you and Mr. Martin that led up to the execution of this receipt?"

Mr. BARNES.—We object to that because it is not competent evidence now to vary by parol that written receipt which was, as he testifies, the culmination of all their talk, that shows what their talk was and any parol evidence should not be permitted to change the terms of it.

Objection overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered: "After we were in Wrangell Narrows, Mr. Martin came down and asked me why we didn't stop at Farragut. He told me that Farragut would be a better fishing site. I told him we had to get out of there on account of the steamers not coming in and on account of the storms. Mr. Martin and I at different times through the week, two or three weeks, spoke about Farragut Bay. He asked me why I didn't stay there. I says, 'I don't think this is right. I think you ought to make this Farragut Bay deal good.' I says, 'If you wish we will go back there,' and he said that we would stay there this year and next year we would go back to Farragut Bay if the steamers would stop there. Then I was subpoenaed to come to Juneau, and Mr.

Martin remained and said to me, 'Now when you come back I think you ought to cancel that note and we will call that Farragut Bay deal square. I don't think it is right to hold that note against me and not deliver the Farragut Bay property. You cancel the note and give me shares enough to make it half. I have got a proposition on hand that we will both get money out of it and not lose anything.' That is what he told me.''

The deft. further asked the witness, ''Q. In that receipt where it states about the articles that were missing from the invoice, what did that refer to?''

Plff. objects because it is incompetent, the receipt is the best evidence.

On cross-examination a letter of the witness to the plff. was read in evidence as follows:

J. W. Martin, Petersburg, 9/19/05.

~~Haines, Alaska.~~

~~Dear Martin: I just got into this port tonight, have had some very bad weather. If we had have been one day later we could not have gotten to Farragut, after your leaving Juneau, I began to think that this would a better proposition with you and I alone. I have purchased J. B. Caro Co. interest and you can have one half of it at any time.~~

In answer to a question by plff., the witness testified that the option referred to was in writing. Whereupon the plff. moved to strike all the testimony in relation to that option for the reason that the option was in writing and the witness has not shown due diligence in attempting to procure the

writing, and the fact of it being in writing was not ascertained before the cross-examination. Motion denied and plff. excepts.

CHAS. E. HOOKER was called as a witness by the deft. and was asked:

Q. Were you present in Caro & Co.'s office at the time these negotiations for the sale were pending, Burford acting as— How did Burford act in this matter?

To which plff. objected on the ground that the paper was the best evidence as to how Burford was acting. Objection overruled and plff. excepts. And this ruling plff. assigns as error.

Deft. further asked him, "Q. You may state what, if anything, was said by Mr. Burford to Mr. Martin touching his title or the title of the defts. or right to sell this fishing site and store building at Farragut Bay?"

Objected to by plff. as tending to change the effect of the written contract and therefore incompetent. Objection overruled and plff. excepts. And this ruling plff. assigns as error.

And the witness answered, "Mr. Burford was the manager."

The COURT.—You must tell what was said and not summarize it or give a general idea of it.

And the witness answered, "I don't remember just the language used. Of course I know that he told him he had these scows and this option on this property at Farragut Bay, the fishing site."

The plff. was recalled by the plff. and on cross-examination was asked by the deft.:

"Q. He sold you one-third interest in the stuff that was at Windham Bay, didn't he?"

The deft. further asked the witness, "Q. Positive that this note was cancelled, because there were some things down there that were worthless any way that you didn't get?"

Plff. objected to the question because it assumes a fact that does not exist. Objection overruled. Plff. excepts.

And this ruling plff. assigns as error. And the witness answered, "Yes."

Plff. was recalled and asked, "Q. Now, I would ask you what you did in pursuance of that statement made by him in having your counsel put the case off?"

Objected to by deft. as immaterial. Objection sustained and plff. excepts. And this ruling plff. assigns as error.

The Court erred in overruling plff.'s demurrer to deft.'s answer.

The Court erred in its judgment herein made and rendered on the 23d day of March, 1908.

Plff. duly moved that defts. make more definite and certain their affirmative defence in this: In paragraph 2 thereof, how he explained to plff., whether in writing or otherwise, the details therein mentioned, and in paragraph 6 thereof, whether the agreement named therein, was in writing or otherwise.

The Court duly sustained plff.'s motion and defts. wholly failed to amend their said answer in any particular. And defts. asked the witness Burford,

"Q. What, if any, dealings did you have with the plff. at that time?"

To which plff. objected on the ground that it comes under the allegations in the answer, to which plff. made a motion and which motion was sustained by the Court that these dealings must be alleged whether they were in writing or by parol, and they didn't do it, so he is precluded from testifying thereon.

Objection overruled and plff. excepts and to this ruling plff. assigns error.

Plff. further objected on the ground of incompetency that all their talk, all their words, actions, etc., were embodied in the bill of sale, and no long explanation of parol testimony can be introduced to vary the terms of that writing. And further, our action is against Caro and Hooker and this man, and we based our contracts upon a statement made by all of them, that no testimony can be introduced under their answer, unless it is the language spoken by one in the presence of all in which all assented.

Objection overruled and plff. excepts and this ruling he assigned as error and the witness answered, "A. At the time we took up the matter of fishing, he stated that he was thinking seriously of going into the fishing business. I said I was thinking of the same thing. We were talking of the fishing business and I explained to him the proposition that I had————————."

The plff. offered the following instructions:

This is an action for alleged deceit of the plff. by the defts. on account of representations made by

defts. The gist of this action is fraudulently producing a false impression on the mind of the plff. This instruction the Court refused to give, to which ruling of the Court the plff. duly excepted. Refused R. A. G. Exception allowed. And this ruling plff. assigns as error.

Plff. offered the following instructions:

Plff. alleges that in order to induce plff. to make such payment, the defts. and each of them, wantonly and falsely represented in said writing to plff. that they owned the store building and were entitled to sell the same, and that the whole of said statement was false and was acted on by plff. in the belief of its truth, and at the time of being made it was known by the defts., and each of them, to be false and was made by the defts., and each of them, with intent to deceive plff., and plff. thereby suffered injury to wit, in the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts. and that plff. at the time was wholly ignorant of the truth or falsity of the said statement but believed the same to be true, and at the time had no means of learning the truth or falsity of said statements and would have paid said sum of $2,000 or any part thereof had it not been for his belief in the truth of said statement, and that deft., or either of them, never at any time ever had any title or ownership or were they ever in possession of said store building, or site, nor were they, or either of them, ever entitled to sell the same, nor had they at the commencement of this action, such title, or were they entitled to sell the same, and that by said false and

fraudulent statements of defts. plff. has been damaged in the sum of $2,000.00, and plff. claims exemplary damages in the sum of $1,000.00. I charge you, that if you believe from a preponderance of the evidence that the above facts have been proven, then it is your duty to find for the plff. Refused R. A. G. Exception allowed. And this ruling plff. assigns as error.

This instruction the Court refused to give. ~~The pltff offered the following instruction: The correct principal is, that the plff is entitled to be placed in the same position he would have occupied had there been no fraud, and that his right of recovery must be determined on this basis.~~

Plff. offered the following instructions to the jury, which by the Court were refused and to which ruling plff. then and there duly accepted. And which rulings plff. assigns as error.

4.

I charge you the law is, if a fact is represented by a party and that fact is susceptible of accurate knowledge and the speaker is or may be well presumed to be cognizant thereof, while the other party is ignorant and the statement is a positive statement containing nothing improbable or unreasonable as to put the other party upon further inquiry, or give him cause to suspect of his faults, and an investigation would be necessary for him to discover the truth, the statement may be relied on, hence I charge you, that the fact of defts. ownership of the building and site of Farragut Bay was a fact susceptible of accurate knowledge, and the defts.

well knew whether or no they were such owners, and there was nothing improbable or unreasonable in the statement, and if you believe from a preponderance of the testimony, that an investigation would have been necessary for plffs. to learn the truth or falsity of said statement, then I charge you, plff. was entitled to rely on the said statements.

Refused R. A. G. Exception allowed.

5.

The fact of the ownership of said store and site by the defts. is a natural fact, and it was made with knowledge of its falsity, and as a positive assertion; hence I charge you the law is, a fraudulent intent on the part of defts. as inferred in its making.

Refused R. A. G. Exception allowed.

6.

The nearness of the signing of said bill of warranty by the defts. and the payment of said money by the plff. is a fact to be considered by you in determining whether the misrepresentations were relied on by plff.; hence I charge you that if the signing of said agreement by defts. was followed immediately by the payment of the money by plff., then the law is, plff. relied on said statements.

Refused R. A. G. Exception allowed.

8.

Where parties are not in possession of land and have neither color or claim of title, under any instrument purporting to convey the premises, or any judgment establishing their rights to them, and

makes false and fraudulent representations as to the title, the purchaser, acting on those false and fraudulent representations, may maintain an action.

Refused R. A. G. Exception allowed.

Where a vendor, in a sale or exchange of real or personal property, makes false representations as to material facts relating to the property, having at the time knowledge that his statements are false, or what the law regards as equivalent to such knowledge, and intending that the purchases shall rely upon them, as an inducement to the purchase, he becomes liable in an action of deceit, in case the purchaser, acting in reliance upon the representations, consummates the purchase and suffers loss thereby.

Refused R. A. G. Exception allowed.

8.

The plff. in this action asks for exemplary damages; in a proper case a party has as much right to exemplary damages as he has to compensatory damages, and it is as much a jury's duty to award in such a case exemplary damages as compensatory damages.

Compensatory damages are damages in compensation of the loss suffered. Exemplary damages may be awarded in all actions of tort, in addition to the sum awarded by way of compensation for the plff.'s injury, if the deft. has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the deft. is

required in order to charge him with exemplary damages.

Refused R. A. G. Exception allowed.

10.

If you believe from a preponderance of the evidence that the defts. in making the statement in writing to plff. that they were the owners of and entitled to sell a one-third interest of one store building and site at Farragut Bay, Alaska, had a reckless disregard of the rights of plff., then it is your duty to include in your verdict, in addition to the amount to reimburse plff. for his actual loss, such sum by way exemplary damages, as, in your judgment, may serve as a protection to society against the violation of personal rights, provided you also find from a preponderance of the evidence, that said statement was false, and was made to induce plff. to pay said sum, and was acted on by plff. in the belief of its truth, and at the time of making it was known by said defts., and each of them, to be false and was made by said defts. and each of them with intent to deceive plff., and plff. thereby suffered injury, to wit, in the loss of his $2,000.00, and so that the same could be wrongfully acquired by defts., and that plff. was wholly ignorant of the truth or falsity of said writing; but intended it to be true, and at the time plff. had no means of learning the truth or falsity of said statements, and that plff. would not have paid the said sum of $2,000 or any part thereof, but for his belief in the truth of said statements.

Refused R. A. G. Exception allowed.

XI.

Plff. alleges that in order to induce him to make the payment of $2,000, defts. wantonly and falsely represented in said writing that they owned the store building and site named therein, and that he would not have paid said sum or any part thereof but for said statement in writing; other articles are named in said writing, but no value has been placed on them by either plff. or deft., hence these articles are valueless. The only property in said writing that have a value is the building and site which defts. allege is of no greater value than $250, this fact may be taken into consideration by you in deciding whether or no the allegation "that but for said statement in writing plff. would not have paid said sum of $2,000, or any part thereof," you may consider whether or no plff. as a reasonable man would have paid said sum of $2,000.00 or any part thereof for property which had no value.

Refused R. A. G. Exception allowed.

XII.

In actions of this kind the law infers an improper motive if what the deft. said was false, within their knowledge, and occasioned damage to the plff.

Refused R. A. G. Exception allowed.

XIII.

In case you find that the plff. is entitled to recover, then I charge you he is entitled to be placed in the same position he was before this transaction complained of took place, and that the value of the

Farragut Bay property is not the sole damage, plff. is entitled to recover.

Refused R. A. G. Exception allowed.

XIV.

The defts. set up a settlement between them and the plff.; before you find for the defts., you must find by a preponderance of the evidence that the settlement mentioned and evidenced by the receipt against the $500 note introduced in evidence was a settlement of the demand plff. urges against the defts. on account of the transaction concerning the Farragut Bay property, and was not a settlement for articles missing from the inventory, provided you also find that plff. was misled by the statements complained of.

Refused R. A. G. Exception allowed.

And for said errors and others manifest of record herein the plff. prays that said judgment of said Court be reversed and such directions be given that a new trial in the court from which this is appealed be granted plff.

E. M. BARNES,
Atty. for Plff.

[Endorsed]: No. 572-A. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. Geo. C. Burford et al., Defendant. Assignments of Errors. Filed Mar. 18, 1909. C. C. Page, Clerk. By A. W. Fox, Deputy. E. M. Barnes, Attorney for Plff. Offices: Rooms 7-8, Lewis Block, Juneau, Alaska.

[Same Court—Same Cause.]

Supplemental Assignment of Errors.

The Court gave the following instructions, to the giving of which the plff. duly excepted, the exceptions were duly allowed and to the Court's ruling in giving said instructions the plff. assigns as error:

XI.

You are instructed that if the plff. was aware that the representations alleged to have been made to him were false, or if the representations and surrounding circumstances and conditions were such as ought to have aroused a suspicion as to their truth in the mind of a person of ordinary business care and caution, then he cannot recover unless he exercise ordinary diligence in endeavoring to ascertain whether or not the representations were true or false; and if you find that the suspicions of an ordinarily prudent and careful business man would have been aroused thereby, and that plff. did not exercise such diligence, he cannot recover. And before you return a verdict for the plff. in this cause, you must be satisfied by preponderance of the testimony as defined in these instructions not only that the representations are of the character and made in the manner and with the intent as alleged, but that they were also made under such circumstances, and the conditions surrounding the transactions were such as to deceive a person acting with reasonable care and ordinary prudence and caution; and in determining this question, you should con-

sider all the circumstances under which the alleged representation appear from the evidence to have been made, and whether under such circumstances the representations were such as a person of common and ordinary prudence would or should have relied upon, or such as would be likely to deceive such a person. Plff. excepts, and exception allowed—R. A. G.

XXI.

I instruct you, gentlemen of the jury, that a bare, naked statement made by the defts., if you believe from the evidence that they made such statements, that they were the owners of the store building and site at Farragut Bay, and entitled to sell the same, unaccompanied by any other statement or fact bearing upon their title or right to sell the same, or made no other representation from which the plff. was induced to believe in such ownership or right to sell, is not such a statement as *conform* the basis of an action. Plff. excepts, exception allowed—R. A. G.

XXII.

I instruct you, gentlemen of the jury, that if you find from the evidence in this case that the deft., Burford, told the plff. that he had an option on the store building and site at Farragut Bay, and did not represent himself that he was the owner thereof prior to the time that the bill of sale offered in evidence provides that the defts. were the owner of and entitled to said store building and site, and you should find for the defts. Plff. excepts and exception allowed—R. A. G.

XXIII.

I instruct you, gentlemen of the jury, that the statements made in a certain letter, Plff.'s Exhibit No. 3, offered in evidence, written by the defts. J. B. Caro & Co. to the plff. at Haines, with reference to the mercantile business at Farragut Bay, is a mere expression of opinion and not such a false representation as, standing alone, can form a basis of an action for decert. Plff. excepts, exception allowed—R. A. G.

And plff. asks the same prayer herein as in the first assignments of error filed.

E. M. BARNES,
Atty. for Plff.

No. ——. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro et al., Defendants. Supplemental Assignments of Error E. M. Barnes, Attorney for Plff. Offices: Rooms 7-8 Lewis Block, Juneau, Alaska. Filed Mar. 22, 1909. C. C. Page, Clerk. By R. E. Robertson, Asst.

[Same Court—Same Cause.]

Bill of Exceptions.

Filed Mar. 18, 1909. C. C. Page, Clerk. By R. E. Robertson, Asst.

[Same Court—Same Cause.]

Transcript of Evidence.

E. M. BARNES, Esq., for Plaintiff.

J. A. HELLENTHAL, Esq., for Defendants.

Be it remembered that on the 20th day of February, 1908, at 2 o'clock P. M., this cause coming on for trial before the Honorable Royal A. Gunnison, Judge of the above-entitled court, and a jury of twelve, the following proceedings were had, to wit:

Mr. HELLENTHAL.—I want to make a tender of a promissory note to the defendant, provided it is accepted in conformity with the agreement alleged in our answer.

Mr. BARNES.—We will accept it on the written agreement that they have made to us at the time. We only accept it on that agreement, and not by the parol agreement in their answer.

The COURT.—That is, do I understand you will accept it on some written agreement?

Mr. BARNES.—To get it on the record straight, we will accept the note on the written agreement made between the defendants and us regarding the cancellation of that $500 note, but we will not accept it on the plea set up in their answer.

The COURT.—Would the acceptance of this note settle the proceeding?

Mr. BARNES.—No.

Mr. HELLENTHAL.—We don't tender it unless it settles it.

The COURT.—Suppose you gentlemen get together and see if you cannot settle this case.

Mr. BARNES.—We will accept it according to the agreement that is made by them in writing. Now, he says he withdraws it unless it is settled in full, so let it go at that.

Mr. HELLENTHAL.—In order that the Court may understand it, the facts as plead in our answer are that the amount stipulated in the bill of sale was $2,000, and that $1500 of that has been paid, and that a note of $500 was still outstanding. We set up a new issue in which we plead that this note was at Juneau and in the meantime the parties had settled at Petersburg, in which settlement it was agreed that this note was cancelled, and a receipt was there given setting up those facts, and the note being inaccessible and not being in the possession of the parties, was not itself turned over. I don't know as it is necessary to tender it in court, but we just tender it here to show that we live up to our agreements.

Mr. BARNES.—We will not accept that note as any settlement of anything. We will accept that note according to the agreement made by them in writing. We have their signature to it. I made a motion in this court to make them state whether that settlement pleaded in their answer was by parol or in writing and they stated that it was by parol. It does not go to settle this case, and we wont take it in that manner.

The COURT.—Then, even if that tender should be accepted, it would not settle the lawsuit?

Mr. BARNES.—No. I claim that where they make no offer of tender in the pleadings, they cannot

now come into court and make a tender. I say it tends to prove no issue raised by the pleadings, because they have not made any such offer by the pleadings, and they have to abide by the pleadings.

The COURT.—You wish this deposited with the Court?

Mr. HELLENTHAL.—Yes, your Honor.

Whereupon the jurors were examined as to their qualifications to act as jurors in the trial of the case, and a jury of twelve were selected and duly sworn.

[Testimony of J. W. Martin, in His Own Behalf.]

J. W. MARTIN, the plaintiff, being sworn as a witness in his own behalf, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Will you give your name to the reporter? A. J. W. Martin.

Q. Where do you reside?

A. Haines, Alaska.

Q. Where were you residing during the month of August, 1906? A. In the same place.

Q. What is your business?

A. General merchandise.

Q. What was your business at that time?

A. The same.

Q. On or about the 28th day of August, 1906, I will ask you to state whether or not you had any business dealings with the defendants in this case?

A. I had.

Q. State whether or not that dealing was represented by an instrument in writing.

A. Yes, sir.

(Testimony of J. W. Martin.)

Q. I will ask you to show it to me.

Witness produces paper, being bill of sale. Marked for identification Plaintiff's Exhibit No. 1.

Q. I would ask you to tell the jury if you know the signature of those parties?

A. Yes, sir, I do.

Q. Read to the jury whose those signatures are.

A. George C. Burford, J. B. Caro & Co., by Chas. E. Hooker, J. B. Caro.

Q. I understand you to say that is the signature of Mr. Caro? A. Yes, sir.

[Plaintiff's Exhibit No. 1.]

Plaintiff's Exhibit for Identification No. 1 offered in evidence by counsel for plaintiff. No objection. Received in evidence and read to the jury, as follows:

Know All Men by These Presents: That we, George C. Burford & J. B. Caro & Co. of the town of Juneau, District of Alaska, for and in consideration of the sum of Two Thousand ($2,000.00) dollars, to us in hand paid, receipt whereof is hereby acknowledged, do hereby sell, transfer and assign unto J. W. Martin, of the town of Haines, Alaska, one-third (⅓) interest in and to the following described property, to wit:

One Scow "Skagitt"; her lines, gear, etc.; one Scow "Volunteer"; her lines, gear, anchor, etc.; one log-float; seine-boat and seines; salt; barrels; tierces; salmon-troughs; and one store building and site situated at Farragut Bay, Alaska, together with all things pertaining to the fishing outfit known as the "Arctic Fishing & Packing Company"; except

(Testimony of J. W. Martin.)

the Launch "Tillicum," which said launch is hereby expressly reserved.

And the said parties of the first part hereby covenants that they are the owners and entitled to sell the said one-third interest of all of the above-described property, which said property is known as the said "Arctic Fishing & Packing Company," and set over the same to the said second party.

In testimony whereof: We have hereunto set our hands and seals this 28th day of August, A. D. 1905.

GEORGE C. BURFORD. [Seal]
J. B. CARO & CO. [Seal]
By CHAS. E. HOOKER,
J. B. CARO.

Signed, sealed and delivered in the presence of:
C. A. MacGREGOR,
L. B. FRANCIS.

United States of America,
District of Alaska,—ss.

This is to certify that on this 28th day of August, A. D. 1905, before me, the undersigned, a Notary Public in and for the District of Alaska, personally appeared George C. Burford and Chas. E. Hooker, of the firm of J. B. Caro & Company, the parties mentioned in the foregoing instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act for the uses and purposes therein mentioned.

(Testimony of J. W. Martin.)

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Notarial Seal] L. B. FRANCIS,
Notary Public for Alaska.

[Endorsed as follows]: Bill of Sale from J. B. Caro & Co. and Geo. C. Burford, to J. W. Martin.

Mr. BARNES.—Q. I would ask you, Mr. Martin, how much, if anything, you paid to the defendants on that agreement? A. $2,000.00.

Q. Do you recognize that note? (Showing witness note.) A. Yes, sir.

Q. Now, I would ask you if that note is a part of the $2,000.00 that you refer to? A. It is.

Q. And if that note is returned to you and surrendered into your possession, then I ask you how much you have paid to the defendants in money?

A. $1,500.00.

Q. Will you tell the jury how you came to pay that money to the defendants?

A. It was paid solely on the representation that they owned this site at Farragut Bay.

Q. Now, have you ascertained whether that statement was true or false?

A. It proved to be false.

Q. At the time it was made, tell the jury whether or not you had any knowledge of its truth or falsity?

A. I had no knowledge, no way of gaining any knowledge.

(Testimony of J. W. Martin.)

Q. Tell the jury whether you believed the statement that was made to be true?

A. I believed it to be true.

Q. Now, I would ask you, Mr. Martin, to state to the jury whether or not if you had had any doubt as to the truth of those statements, you would have paid this sum of $2,000.00, or any part thereof?

A. I certainly would not.

Q. And you have already stated that the statement that they made to you was false, haven't you?

A. Yes, sir.

Q. How much damages do you claim, provided that note is returned to you, that $500.00 note?

A. $2,500.00.

Q. And of what does that consist, Mr. Martin? How much compensation for the loss you have sustained do you desire? A. $1,500.00.

Q. Then how much damages as exemplary damages do you ask? A. $1,000.00.

Q. Making altogether $2,500.00 instead of the $3,000.00 asked when you first filed the complaint?

A. Yes, sir.

Cross-examination.

Mr. HELLENTHAL.—Q. Now, you only want $2,500.00, Mr. Martin, if you get that note back?

A. Yes, sir.

Q. For that Farragut Bay? A. Yes.

Q. When did you first meet George Burford?

Mr. BARNES.—We object as immaterial when he first met him.

(Testimony of J. W. Martin.)

The COURT.—I think it might be material as to the credence he put in the statements of Mr. Burford.

A. About the time of this transaction.

Mr. HELLENTHAL.—Q. Where?

A. At Juneau.

Q. Where in Juneau?

A. In the office of J. B. Caro & Co.

Q. Who was present?

A. I think Charlie Hooker and Mr. Burford.

Q. Is that the time that George told you that he owned that Farragut Bay fishing site?

Mr. BARNES.—We object to it, if your Honor please, for this: the only statement that we complain of is the statement in writing in that contract under seal. It is a well-established rule of law, and has been since law has been administered, that words spoken before a writing has been executed cannot be introduced for the purpose of changing the writing or the terms of the writing. It is another well-established rule of law that where a writing is plain and speaks for itself, in no instance can it be explained away; and there is another rule of law that a contract under seal can be contradicted only by another contract under seal and made subsequent thereto. Consequently, the question which counsel asks is incompetent evidence. We object to it for that reason, because a written contract is a culmination of all their talks together in one sheet of writing, and that is the one we complain of, that written contract.

(Testimony of J. W. Martin.)

(After argument.)

The COURT.—I think the general proposition of law which you state is correct, but you have thrown down the bar by your questions to the witness as to his actions, and it is proper cross-examination.

Mr. BARNES.—Another reason, if your Honor please. In their answer, they set up "That on or about the said 28th day of August, 1905, the said George C. Burford sold to the plaintiff a one-third interest in and to the entire fishing outfit aforesaid, save and excepting a certain launch called the 'Tillicum,' which had formerly belonged to said outfit, for which interest the plaintiff then and there agreed to pay the said George C. Burford the sum of two thousand dollars; and the said George C. Burford, then and there agreed, after explaining in full to the plaintiff all the details in connection with his said option hereinbefore referred to upon said store building and site at Farragut Bay, to exercise and take up the said option." Now, then, referring to the papers that you have there, I moved the Court that he be compelled to state whether that was an agreement in writing or whether by parol, and the Court held that my motion was good, which is entered on Book E, on June 4th, of the records of this court. Now, he didn't amend his answer and he is not allowed to come in and prove that statement in any manner, because he didn't amend his answer. They are precluded from introducing any evidence in explanation of that agreement whatsoever, because this Court has held that they must in-

(Testimony of J. W. Martin.)

sert in their answer whether it was in writing or by parol, and they didn't do it. Now, can they come in in cross-examination and prove that which they weren't allowed to prove because of their own failure to amend. They are in default so far as that allegation is concerned.

(After argument.)

Objection overruled. Question read by a stenographer.

Mr. BARNES.—It assumes a fact that does not appear on the direct examination. It does not appear anywhere in the direct examination that "George" told him anything. The only thing that appears in the direct examination is the statement in writing.

The COURT.—I sustain the objection to the form of the question.

Mr. HELLENTHAL.—Q. So you didn't know anything about this Farragut Bay business at that time other than what you saw in the bill of sale, Mr. Martin? A. No.

Q. You never had any talk with George Burford and Charlie Hooker about George having an option upon that property?

Mr. BARNES.—To which we object as not cross-examination. We didn't bring out any conversation that he had with them at all.

Objection overruled. Plaintiff excepts.

A. No, sir.

Q. George Burford didn't tell you, in Caro & Company's office, in the presence of Charlie Hooker,

(Testimony of J. W. Martin.)

all about this Farragut Bay property, telling you that he had an option on it for $225.00, did he?

Objected to by counsel for plaintiff as not proper cross-examination. Objection overruled. Plaintiff excepts.

Mr. HELLENTHAL.—I will state it as an impeaching question.

Q. George Burford didn't explain to you in the presence of Charlie Hooker, in Caro & Company's office, along about the time this bill of sale was signed, or a day or two before the time, a short time before it anyway, you and Charlie Hooker and George Burford being present, the fact that he didn't own the site at Farragut Bay, but had an option on it to purchase that site for $225.00?

A. He did not.

Q. No such conversation was had?

A. No, sir.

Q. You didn't know that he had an option on it?

A. No, sir.

Q. You believed he owned it?

A. I did.

Q. How much did you calculate that site for, Mr. Martin, as being worth in making up your estimate of the property that was being conveyed to you at that time?

Mr. BARNES.—To which we object as immaterial. There is no value alleged by them as to any property. The only value that is alleged in the complaint or answer is the value which this property had, which was $250.00 or less. They cannot

(Testimony of J. W. Martin.)

come in now and endeavor to establish what his opinion of the value was, because they have not alleged that there was a value to it, and if there was a value to it, they should have alleged it. Why didn't they say that the tierces and barrels, etc., were worth so much and the seines were worth so much, and so on? I say now that they cannot come in and show a value to exist which does not exist in the pleadings.

The COURT.—If I remember the testimony, in reply to one of your questions, I think the witness said that the price paid was for this property, something to that effect, and that that was the reason for the payment, because they had this property. That opens the door to cross-examination as to his estimate of the value of that property.

Mr. BARNES.—Which property?

The COURT.—I understood your question to refer to the property at Farragut Bay.

Mr. BARNES.—The house and lot, if you please.

The COURT.—Yes.

Mr. BARNES.—If we had sued for misrepresentation of the value, the question would be pertinent. We didn't, and the pleadings admit that it was worth $250.00, and that is the end of it. While we might have brought a suit on that ground, we didn't do it. We simply brought this suit, that they sold us the property and they didn't have any title to the property, which the laws says we are entitled to bring, and that we paid $1,500.00 for that property.

(Testimony of J. W. Martin.)

The COURT.—Referring to the property at Farragut Bay, not the floating property.

Mr. BARNES.—The floating property is valueless under the pleadings.

Objection overruled. Plaintiff excepts.

Stenographer reads question.

Mr. BARNES.—It is not shown that he has made any estimate of its worth, if your Honor please.

Objection overruled. Plaintiff excepts.

A. We had not figured on any definite value.

Q. You had placed no particular value on this particular piece of property at all, Mr. Martin?

A. Yes, the principal value was placed in this.

Q. The principal value? A. Yes.

Q. You said a moment ago it was the only value, didn't you?

Objected to by counsel for plaintiff, *to exist, which is.* Objection sustained.

Q. You stated a moment ago, Mr. Martin, that you paid that money solely on the representation that they owned that property at Farragut Bay. Is that true? A. Yes, sir.

Q. That money was paid solely for that Farragut property?

Mr. BARNES.—We object to that because that is not the evidence at all. He said he paid it solely on the representation that they were the owners of that property.

Mr. HELLENTHAL.—I will change the question.

(Testimony of J. W. Martin.)

Q. You didn't pay any of that money on the representation that they owned the balance of the outfit, Mr. Martin, did you?

A. Balance of what outfit?

Q. Didn't you get an interest in any outfit from George Burford?

Mr. BARNES.—To which we object. The bill of sale is the best evidence, and that does not say that he got it. They simply assigned and set it over to him. And the bars was not let down for that.

Objection overruled. Plaintiff excepts.

A. Yes, sir, I was supposed to get an interest in this fishing outfit.

Q. Didn't you get it?

Objected to by counsel for plaintiff, as the bill of sale is the best evidence. Objection overruled. Plaintiff excepts.

A. No, sir.

Q. You got everything except that Farragut Bay site, didn't you? A. No, sir.

Q. What else didn't you get?

A. I didn't get anything as it was represented.

Q. You didn't? How was it represented to you?

Mr. BARNES.—We object, because it is they that brought this out in the cross-examination, and it is represented in the bill of sale.

Objection overruled. Plaintiff excepts.

A. Well, at the time the building and site at Farragut Bay as represented had never been got possession of, and the scows described in the bill of sale proved worthless.

(Testimony of J. W. Martin.)

Q. Didn't you go and look at them?

A. Yes, sir, I saw one of them.

Q. Which one did you see?

A. One of the scows.

Q. See the "Skagitt"? A. Yes, sir.

Q. Did you get the "Skagitt"?

A. I got pieces of her.

Q. Yes, she broke up at Farragut Bay. You know that, don't you?

A. No, sir, I don't know it.

Q. Did you see her before you bought her?

A. Yes.

Q. Did you get her?

A. I got pieces of her.

Q. Did George smash her up after the bill of sale was signed, after the time you saw her and after you bought her?

Objected to by counsel for plaintiff. Question withdrawn.

Q. When you got the scow was the scow in the same condition that she was when you saw her?

A. Yes, substantially.

Q. Didn't you say a minute ago that she was in pieces when you got her?

The COURT.—No, he did not say that.

Mr. HELLENTHAL.—Q. She was all right when you got her was she?

Objected to by counsel for plaintiff as assuming a fact to exist that is not in the evidence. Question withdrawn.

(Testimony of J. W. Martin.)

Q. You got what you bought with relation to the "Skagitt," didn't you? There was no misrepresentation about the "Skagitt"; you saw her, didn't you?

A. There certainly were misrepresentations about her.

Q. You saw her? A. Yes.

Q. She was not as good as you thought she was?

A. No, sir, she was not.

Q. You made a mistake in buying her? Is that what you mean?

Mr. BARNES.—We object to that. We are not complaining about this scow. Suppose it was worthless; supposing he did make a mistake. He wanted that site to start business in. That is why he paid this money. He is a merchant. He is not a ship man. He wanted to buy this store building so as to start another store. The pleadings show that these things were absolutely worthless, no value on them at all.

Objection overruled. Plaintiff excepts.

Stenographer reads question.

A. Well, yes, it proved to be worthless. Of course, we didn't place any special value on it, but what little value there might have been considered to be on it at the time proved to be of no value.

Q. That was not a misrepresentation by anybody, was it?

Mr. BARNES.—We object to that. We are not suing for misrepresentations as to the scow.

Objection sustained.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. You got the "Skagitt's" lines, didn't you?

Mr. BARNES.—To which we object. There is no issue as to that, and we say it is immaterial. It does not tend to prove any fact raised by the pleadings.

The COURT.—I think he has testified that he got all these things.

Mr. HELLENTHAL.—Q. You got everything enumerated in this bill of sale except the Farragut Bay site, didn't you, Mr. Martin,—your third interest in it, I mean?

Mr. BARNES.—They don't allege he got anything. They simply allege it was assigned to him. How can they prove a delivery when it is not alleged?

The COURT.—There is no denial of a delivery, is there?

Mr. BARNES.—There is no denial. There is no allegation of theirs in their affirmative defense that alleges this matter. It seems pretty hard to let them prove it on cross-examination when it is not alleged in their answer. It looks to me, if it had been delivered and they wanted to prove it, that they should have alleged it.

The COURT.—Now, as I understand it, the only issue in the case is as to the Farragut Bay property.

Mr. BARNES.—Yes.

Mr. HELLENTHAL.—Your Honor, that is the only issue, and the purpose of this question is this: Mr. Martin testified that he paid us money solely

(Testimony of J. W. Martin.)

upon the representations with reference to the Farragut Bay property, and this is to cross-examine on that statement.

Objection sustained. Defendants except.

The COURT.—Confine your cross-examination to the property.

Mr. HELLENTHAL.—Q. Did you ever get an invoice from Mr. Burford, or statement that was made out at that time enumerating all these various items set out in this bill of sale and placing a valuation upon each?

Objected to by counsel for plaintiff, as not proper cross-examination.

The COURT.—I think that may be cross-examination. It goes to the value or the price which he paid to the parties which he says he paid solely on the representation of the defendants as owning that property. If it appears that there were other things that he paid it for—it is an issue in the case what he paid this money for.

Mr. BARNES.—It is an issue in the case why he paid that money, not what he paid it for.

The COURT.—Well, why he paid it. I overrule the objection.

Plaintiff excepts.

Stenographer reads question.

A. I did not.

Mr. HELLENTHAL.—Q. You never saw any such invoice? A. No, sir.

(Testimony of J. W. Martin.)

Q. You and Mr. Burford didn't go over all these various items enumerated in this bill of sale and place a valuation on each of them?

Objected to by counsel for plaintiff, as not proper cross-examination.

The COURT.—I think it might go to show what the motive was for which he paid the money.

A. We did not.

Q. How long were you in making this agreement to purchase this third interest?

A. Something like a day or a day and a half.

Q. You didn't place any valuation on any one item in here?

A. Except the Farragut Bay item—

Objected to by counsel for plaintiff, as not proper cross-examination.

The COURT.—The question is whether he paid the money for one thing or all the things. I sustain the objection to the form of the question.

Mr. HELLENTHAL.—Q. Did you pay all the money that you paid, the $1,500.00 or $2,000 or whatever you paid just merely for that Farragut Bay site?

Mr. BARNES.—We object to that as not cross-examination. The question was and this suit is that if it had not been for that statement they would not have paid a dollar. He did not care anything for this other property.

The COURT.—That is just the purpose of this question. I overrule the objection.

(Testimony of J. W. Martin.)

Plaintiff excepts.

A. Yes, sir, solely for that purpose. The other part of the outfit didn't cut any ice in the matter as I looked at it.

Q. You would have paid that money for this one-third interest in the Farragut Bay site irrespective of all this other outfit?

Mr. BARNES.—To which we object. The question is "Did he do it?"

Question withdrawn.

Mr. HELLENTHAL.—Q. These other items enumerated in this bill of sale had nothing to do with the question of your paying this money at all, did they?

A. They were valueless, the rest of them.

Q. Valueless? A. Yes, sir.

Q. They were just put in there to make it look good?

Mr. BARNES.—We object to that statement of counsel. The witness didn't say it at all.

The COURT.—He is not testifying. He is asking a question. The jury will understand that the questions propounded by counsel are not evidence.

Mr. BARNES.—Another objection is that the record is the best evidence.

The COURT.—You have read it to them, and it will go to the jury-room with them. I overrule the objection.

Plaintiff excepts.

Stenographer reads question.

(Testimony of J. W. Martin.)

A. Yes, sir, that is the only purpose I can figure on the proposition.

Mr. HELLENTHAL.—Q. They didn't go in to make up the value of the $2,000.00?

A. No value to the outfit at all.

Q. How many things enumerated in this bill of sale did you see before you made the purchase?

Objected to by counsel for plaintiff, as not proper cross-examination. Objection overruled. Plaintiff excepts.

A. I saw one scow.

Q. The "Skagitt"? A. Yes, sir.

Q. Did you see the building at Farragut Bay?

A. I did not.

Q. You knew nothing about that at all?

A. No, sir.

Q. Did you ever ask George about these other items enumerated in this bill of sale besides the Farragut Bay property?

Mr. BARNES.—We object to that question. Their answer sets up that fact, and they are trying to make our witness testify and substantiate their answer. Their answer sets up that certain articles were missing and because they were missing they had no other settlement afterwards. That is part of their case.

Objection overruled. Plaintiff excepts.

Mr. HELLENTHAL.—Q. Mr. Martin, did you have any talk with Mr. Burford about these other items enumerated in this bill of sale besides the Farragut Bay property before you bought it?

(Testimony of J. W. Martin.)

A. Yes, we talked over these items.

Q. Anything said about the value of them?

A. No value put on them at that time.

Q. You didn't consider them of any value?

A. They were to work in in connection with this mercantile site at Farragut Bay.

Q. Was Mr. Burford to go in there with you in the mercantile business? A. No, sir.

Q. You were buying only a third interest, Mr. Martin?

Mr. BARNES.—If your Honor please, he says in that business. We say we were buying a third interest in the building.

Mr. HELLENTHAL.—I will add that word "building."

Q. You were buying only one-third interest in this building, were you not, Mr. Martin?

A. Yes, sir.

Q. You also bought one-third interest in this other stuff enumerated? A. Yes, sir.

Q. You were intending to run a store there?

A. That was the idea.

Q. Mr. Burford was not going to be interested with you in that store? A. No, sir.

Q. Did you make any arrangements with him for the use of the store for that mercantile business with reference to his two-thirds interest in that building?

Objected to by counsel for the plaintiff as assuming the fact that Burford owned two-thirds interest in the store, which is not in the evidence. Objection sustained.

(Testimony of J. W. Martin.)

Q. Did you make any arrangements looking towards the acquisition of the right to use the other two-thirds interest in that store?

Objected to by counsel for plaintiff, as not cross-examination. Objection sustained. Defendants except.

Q. Mr. Martin, didn't you buy this site of Burford for the purpose of going into the fishing business? A. No, sir.

Q. You didn't intend to go into the fishing business at all?

Mr. BARNES.—We object to that. A man might be a Democrat and vote the Republican ticket some time, but not at that time. What he intended to do ever is not pertinent to this issue.

Objection sustained.

Mr. HELLENTHAL.—Q. You placed no value on any of this property except the Farragut Bay property? A. No, sir.

Q. You bought it for that express purpose?

A. Yes, sir.

Q. You valued the one-third interest in that Farragut Bay property at $2,000.00?

Objected to by counsel for plaintiff, as not proper cross-examination.

The COURT.—I sustain the objection on the question of value. It doesn't make any difference what he valued it at if he paid $2,000 for the property.

Mr. HELLENTHAL.—Q. Did you pay $2,000 for one-third interest in that property at Farragut Bay?

(Testimony of J. W. Martin.)

Counsel for plaintiff objects on the ground that the bill of sale is the best evidence. Objection overruled. Plaintiff excepts.

A. That was the consideration. The rest of this outfit went in as of minor value.

Q. What do you mean by minor value, something just thrown in?

A. Yes, sir. That is the idea.

Q. The purchase that you made was really of that site at Farragut Bay? A. Yes, sir.

Q. And you placed no value whatever on the other stuff?

Mr. BARNES.—We object to it because it is not cross-examination, and assumes a fact to exist which is not in the evidence. He says he only saw that scow. How could he place a value on something he didn't see?

Objection sustained to the question in that form. It is not a question of values, but what he paid.

Whereupon Court adjourned until to-morrow morning at 10 o'clock.

February 21, 1908, at 10 o'clock A. M.

J. W. MARTIN, recalled on cross-examination, testified as follows:

Mr. HELLENTHAL.—Q. Mr. Martin, I understood you to say on yesterday that you had received no invoice of this bunch of stuff that you bought?

A. I have not.

Q. You never did have any? A. No, sir.

Paper marked for identification Defendants' Exhibit "A."

(Testimony of J. W. Martin.)

Q. I hand you here a paper marked for identification Defendants' Exhibit "A," and ask you to look at it and state if that is your writing, and that is your signature appended to that paper?

Mr. BARNES.—We object to any questions being asked the witness about it until the paper can be examined by us.

Counsel for plaintiff is allowed to examine paper.

Mr. BARNES.—We object to any testimony in this matter because it is not cross-examination, the date of the paper being September 1st, 1905. The transaction on which this suit is based occurred on August 28, 1905, and it is not part of the cross-examination; and again, the defendant cannot make out his case by cross-examination of the plaintiff's witnesses.

Mr. HELLENTHAL.—I only desire to offer that last part there with his signature, if your Honor please.

Mr. BARNES.—If any part goes, it all has to go, if your Honor please.

Stenographer reads question.

The COURT.—I will allow the question.

Mr. HELLENTHAL.—Q. Look at this, Mr. Martin.

Witness looks at paper.

A. That is my signature.

Mr. HELLENTHAL.—I will now offer this in evidence, your Honor.

The COURT.—I think you should offer it in your own case.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—It is probably just as well. I will offer it in my own case.

Q. Now, Mr. Martin, when you bought this property for which the bill of sale was executed to you, you say that was about a day and a half after you first met Mr. Burford? A. Yes, sir.

Q. Did you ever talk with anyone about this property in the meantime, aside from Mr. Burford?

Mr. BARNES.—We object to the question and ask that he make it more definite. It does not call the witness' attention to what part of the property he was talking about.

Objection sustained.

Mr. HELLENTHAL.—Q. Did you ever make any inquiries in regard to this Farragut Bay property of anyone? A. Yes, sir, I think I did.

Q. Who?

A. I think I talked with Harry Raymond for one.

Q. Harry told you about the property, did he?

A. Yes, sir, something about it.

Q. George told you what the property consisted of, didn't he? George Burford told you about the property, didn't he? A. Yes, sir.

Q. And what he told you, did that coincide with what Mr. Raymond told you?

Mr. BARNES.—I object to the question as not cross-examination. The question that opened the door was "What induced you to pay this money?" the statements of the defendants, if your Honor please. Now, if your Honor please, I ask the Court

(Testimony of J. W. Martin.)

to confine the cross-examination to testimony of statements of each of the defendants, what each one said, but it must have been in the presence of the others, because that is what our testimony was, referring to the one time when they were all present, or the rule might be extended to any other time that they were all present, concerning this same transaction.

The COURT.—I think any statement of anything to this witness which conveyed to him any information with reference to this property prior to the time of the consummation of the agreement is material and competent, whether it was in the presence of all of them or of one.

Mr. BARNES.—Now, is this evidence introduced to change the terms of the written contract, or is it introduced to test the credibility of the witness?

The COURT.—Your action is an action in deceit. In order to establish that action, you must show that the plaintiff was deceived by the statements of the defendants. Now, if it is possible to show on cross-examination information which he had as to this property from statements made by any one of the defendants that would tend to show that he was not deceived, they are material.

Mr. BARNES.—I think, your Honor, on that part of it I agree with the ruling of the Court, but it is not for any other purpose except to test the credibility of the witness.

The COURT.—To show that he was deceived, that is the purpose of it.

(Testimony of J. W. Martin.)

Mr. BARNES.—Does your Honor rule that it can go to other persons outside of the defendants?

The COURT.—Whatever his information was on the subject, if it is possible to show that he knew what the conditions were.

Stenographer reads question.

A. I don't quite understand the question.

Mr. HELLENTHAL.—Q. Mr. Raymond told you just what Mr. Burford did about the property, didn't he? A. He did not.

Q. Now, what did Raymond tell you about it?

Objected to by counsel for plaintiff as immaterial; no time, place or circumstances called to his attention.

The COURT.—Is this for the purpose of impeaching the witness, or showing the information that he had?

Mr. HELLENTHAL.—It is for the purpose of showing the information he had on the subject.

The COURT.—If the question is framed and propounded for the purpose of impeaching the witness, it is not in the proper form; if it is for the purpose of disclosing the information which he had upon the subject at the time prior to the consummation of the agreement, it is competent for the purpose.

A. Mr. Raymond didn't give me any definite information as to the store building site, etc., but he led me to believe that it was a desirable place for a store, being situated in the fishing district down there; whereas, Burford represented that he owned a two-story building down there and site.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. A two-story building?

A. Yes, sir, a large two-story building, suitable for store purposes.

Q. Did you make any inquiries at all, Mr. Martin, with reference to Mr. Burford's ownership, or the ownership of the other defendants, to this property?

Mr. BARNES.—We object. The law does not require him to make any inquiries.

The COURT.—It is proper to ascertain if he did. Whether or not he is compelled to is a question of law that is to be given to the jury at the close of the case. While the law does not require him to make it, if he did make such inquiry and had information on the subject that would bear on the case, I think the question is material as going to show what his information was.

Mr. BARNES.—On the theory that if he had information from some other source it would preclude the idea of his being deceived?

The COURT.—Yes, sir.

A. No, sir; I think not. I took Mr. Hooker and Mr. Burford's word in the matter.

Mr. HELLENTHAL.—Q. Didn't Mr. Hooker also tell you that they had title?

Mr. BARNES.—We object to that, because it is in paper writing here, which he is not permitted to deny, or anybody else, that he alleged they did have title, and they are not permitted to come in and

(Testimony of J. W. Martin.)

change the statement that they made in writing, and all previous negotiations and verbal statements are merged in this written contract.

The COURT.—I think that general proposition is correct. I do not think that renders this question incompetent. I overrule the objection.

A. That is my recollection at this time.

Mr. HELLENTHAL.—Q. Now, Mr. Martin, you knew that Farragut Bay was in this Juneau Recording District, didn't you?

A. Yes, I guess so.

Q. Did you ever go to the records here to examine the title to that property, or did anyone go for you?

Mr. BARNES.—We object to that on the ground that it is immaterial. The law expressly says that he didn't have to.

The COURT.—I think it is material to show whether or not he did that. As to whether or not he was obliged to have done so before he could bring an action is another question. It is merely to show his knowledge.

Mr. BARNES.—Now, your Honor, suppose he said he did not go. He is not prevented from recovering because he didn't go. I am ready to present that to your Honor.

The COURT.—The question is not here. When the case is finished, if the defendants should move for a nonsuit on that ground, then we would be in a position to dispose of that question.

Plaintiff excepts.

(Testimony of J. W. Martin.)

A. I think not. I relied on their word.

Mr. HELLENTHAL.—Q. Entirely? You relied on their word entirely? A. Yes, sir.

Q. And made no inquiry whatsoever?

A. Not at that time.

Q. Not until after the deal was consummated?

A. Yes, sir.

Q. Now, you knew that all the property about Farragut Bay, that whole country there, was public domain, didn't you?

Objected to by counsel for plaintiff, as immaterial.

The COURT.—If it was public domain and he was on there by possessory title, it was as good as a fee against all persons except the United States.

Mr. HELLENTHAL.—Q. You knew there was a lot of public domain around there, this included, didn't you?

Objected to by counsel for plaintiff as immaterial. Objection sustained.

Q. Now, Mr. Martin, you say you didn't buy in there to go into the fish business?

A. I didn't care anything about the fish business. That was a side issue.

Q. You did, however, go into the fish business?

Objected to by counsel for plaintiff as not pertinent to the issues, and attempting to prove their case on cross-examination.

(After argument.)

The COURT.—I will sustain the objection.

Mr. HELLENTHAL.—Now, Mr. Martin, you never went to Farragut Bay, did you?

(Testimony of J. W. Martin.)

Objected to by counsel for plaintiff as immaterial. Objection overruled.

Q. You never went to Farragut Bay before the time that this bill of sale was executed, did you?

Mr. BARNES.—To which we object as too general. There was a good many years happened before that bill of sale was made out.

Objection sustained.

Mr. HELLENTHAL.—Q. Mr. Martin, you didn't while these negotiations were pending, before the execution of this bill of sale, go to Farragut Bay, did you?

Mr. BARNES.—I object to it as immaterial. He didn't have to.

The COURT.—I understand your position, but if he did, and had knowledge of it, it would be quite material. I overrule the objection.

Plaintiff excepts.

A. I could not get in there.

The COURT.—Q. Did you ever go there?

A. No, sir.

Mr. HELLENTHAL.—You could have chartered a boat and gone there, couldn't you?

Objected to by counsel for plaintiff as immaterial.

The COURT.—I sustain the objection. He might have done lots of things. The question is what he did do.

Mr. HELLENTHAL.—The question is what should he do. That is a further question.

The COURT.—That is a question of law, what he should do. The Court takes judicial notice that

(Testimony of J. W. Martin.)

there are in the harbor of Juneau gasoline boats for rent that can be rented almost at any time of the year to go most anywhere for a compensation, but it is not material whether he might have rented boats or not.

Mr. HELLENTHAL.—Q. Mr. Martin, did you pay that $1500.00 in cash?

A. Substantially so, yes.

Q. Did you pay it all at once? A. No, sir.

Q. How much did you pay cash?

A. $300.00.

Q. You paid the other $1,200.00 later?

A. Thirty days later.

Q. The other $500.00 you never paid?

A. No, sir.

Q. That note is still outstanding?

A. Yes, sir.

Q. Did you, Mr. Martin, ever have any settlement with Mr. Burford of these matters?

Objected to by counsel for plaintiff as part of the defendants' case. Objection sustained.

Q. Mr. Martin, what kind of a scow is the "Skagitt"?

Objected to by counsel for plaintiff as not cross-examination.

Q. How large was it?

Mr. BARNES.—We object to it.

The COURT.—What is the purpose of it?

Mr. HELLENTHAL.—The purpose is to show that this man bought the "Skagitt,"—that the thing

(Testimony of J. W. Martin.)

that moved him to make this purchase was the scow "Skagitt" and the other outfit, and not the Farragut Bay site; that the Farragut Bay proposition was an incidental, and merely thrown in; that the moving consideration in paying out this money was the things that he actually did get.

The COURT.—I think you have been over that once. I will sustain the objection.

Mr. HELLENTHAL.—Q. Neither Mr. Burford nor Mr. Hooker, nor Mr. Caro, nor any of the defendants have made any detailed statement to you as to how they came by this property, or how they came to own it; they merely said they were owners; isn't that right?

Mr. BARNES.—To which we object. It is immaterial. The ultimate statement is that they were the owners.

Objection sustained.

Mr. HELLENTHAL.—Q. You have narrated now, Mr. Martin, all the statements made to you by the defendants with reference to the ownership of this property by them, have you not?

A. As far as I know, yes.

Q. Mr. Raymond told you what kind of a store building there was on the ground before you bought it, didn't he? A. I didn't say so.

Q. Did he? A. No, sir.

Q. Burford told you? A. No, sir.

Q. Did anyone else tell you anything about it?

A. Not that I recall now.

(Testimony of J. W. Martin.)

Q. And you made no further inquiry?

A. I did not.

Redirect Examination.

Mr. BARNES.—Q. You stated yesterday that you had received no invoice of this property. Now, I would ask you if, since the adjournment yesterday, you have found that you were mistaken in the matter? A. Yes, sir.

Q. When was the invoice received?

A. I think it was received after the transaction.

Q. And sent to you at Haines? A. Yes, sir.

Q. After you had made the purchase. And you desire to make this correction of your statement now? A. Yes, sir.

Q. Now, I would ask you, Mr. Martin, if preceding the time of the signing of this bill of sale and while the trade was being made—tell the jury what representations were made to you by the defendants regarding the availability of that point there and that building to do a mercantile business in?

Mr. HELLENTHAL.—We object to that. It is immaterial. A man has got a right to puff up his goods as much as he wants to.

Mr. BARNES.—We make this offer. We propose to show to you that before the sale was made these defendants represented to this plaintiff that that was a place to do a good mercantile business; that, in writing we have it from them, they made out a list of goods that he should carry down there in that mercantile business; that from them we had a

(Testimony of J. W. Martin.)

statement denying their purported statement that George Burford had an option on the building and site down there, but that he owned it; that we have the further statement in writing that that point is a better point for business than he had in Haines. We will prove that at that time his business at Haines was worth $15,000 a year. We will prove to you that now his business is worth $20,000 a year. We offer to prove that the fishing business was a side issue, and he didn't care for it. He was looking for a building two stories high, a store building where he would do a greater business and a better business than the business he was doing at Haines. He has been a merchant all his life. I say that is a fact to go to this jury to show that upon the representations of these defendants that they owned this building, he paid this money. We have a right to show that by the machinations of these defendants, they led him to believe that that property and building down there was very available for a store building.

The COURT.—I understand it. I know what you want to prove now.

Stenographer reads question.

Objected to by counsel for defendants on the same ground as the last objection and the further ground that it is a statement of his opinion. Objection overruled.

A. They represented that this was a better site than my then location at Haines, a better site to do business in, and I was at that time and had been doing a good business at Haines.

(Testimony of J. W. Martin.)

Mr. BARNES.—Q. How much?

Objected to by counsel for defendants as immaterial. Objection sustained.

Mr. HELLENTHAL.—I withdraw the objection.

A. About $15,000 annually.

The COURT.—Q. Gross or net?

A. Gross receipts. And on that proposition, I purchased.

Mr. BARNES.—Q. State to the jury whether or not they suggested to you certain articles and goods that should be carried down there by you, to support the trade that you would have down there?

Objected to by counsel for defendants, as leading. Objection sustained.

Mr. BARNES.—"Whether or not," if your Honor please.

Objection overruled.

A. Did they give me a list?

Q. Yes. A. Yes, sir.

Q. Now, was that suggestion in writing?

A. It was.

Mr. HELLENTHAL.—Was that before or after the purchase of the property?

Mr. BARNES.—Before the purchase of the property.

Objected to by counsel for defendants as immaterial. Objection overruled.

Q. Have you a part of that list with you that was made in writing? A. I have.

Q. May I see it?

Witness produces list.

(Testimony of J. W. Martin.)

Q. By whom was this made, the defendants or somebody else?

A. By the defendants, or one of the defendants.

List of articles marked for identification, Plaintiff's Exhibit No. 2.

Q. What has become of the balance of this statement that was made by them at that time?

A. I burned it up, thinking it of no value. I burned it, I think, in your office.

(List of articles offered in evidence.)

Mr. HELLENTHAL.—I object to the offer as immaterial. It does not prove any misrepresentation, just shows what these people wanted to do in a business way. That is all.

The COURT.—Q. That is a paper that you received from the defendants? A. Yes, sir.

Q. Which of the defendants?

A. I think Mr. Burford. It was given to me.

Q. Handed to you?

A. Yes, sir, in their office down there. I would not be sure whether Burford or Hooker.

Q. Prior to the signing of the bill of sale?

A. Yes, sir.

The COURT.—I will admit it.

Plaintiff's Exhibit No. 2, received in evidence, and read to the jury, as follows:

[Plaintiff's Exhibit No. 2.]

Kirby Hooks, Halibut
32# ground line
16 & 18 ganging line
Lobster twine

(Testimony of J. W. Martin.)

Ropes, 9 threads to 36 thread—3 strand rope
Oil Clothing, Johnsons best
Short Coats mostly, very few ¾ sold
Pants O-OO
Nippers
Canvas gloves
Genuine Woolen Mitts, reversible, white
Stockholm tar, 5 gals.
Flax twine, 8 ply
15# Dory anchors, about 20#
Dory Rollers—6
Girders 6
Gold Sea Boots

You can get better prices from C. W. Young than the Seattle Hardware Co.

Mr. BARNES.—I understand you to say that is a partial list made out by the defendants of goods that you would need to carry in that store in order to do a successful business? A. Yes, sir.

Q. Now, Mr. Martin, I understand you to say that on the signing of this bill of sale you paid cash in hand $300.00. Who got that money, if you know?

A. I think it was put in the safe of Caro & Hooker.

The COURT.—Q. To whom was it handed?

A. It was put on their desk there. Mr. Hooker and Mr. Burford were there.

Q. You don't know how it was divided?

A. I don't know. No, sir.

Mr. BARNES.—Q. I believe you stated that at that time you gave a note of $1,200.00 at the time of this transaction? A. Yes, sir.

(Testimony of J. W. Martin.)

Q. I will ask you if from the defendants you received any communication between the time you gave that note and the time it was due concerning this store property down there and any representations as to what business you might conduct down there?

A. I did.

Mr. HELLENTHAL.—We object to that. That is certainly immaterial, what communication he received. The deal was closed. That cannot be a false representation that relates back to anything that might have been said before the deal was made. The consummation of the deal would end the false representations.

Mr. BARNES.—Your Honor permitted them to show that we purchased other property instead to this store. Now we offer this letter written by the defendants to us on September 9th. The note was payable on the 28th of September. We offer to prove by this letter that they therein stated that instead of George Burford having an option on that building, he owned it.

Objection overruled.

Letter dated September 11th, 1905, marked for identification Plaintiff's Exhibit No. 3.

Mr. BARNES.—We offer it in evidence.

Mr. HELLENTHAL.—We object to it as immaterial for the representation to be relied on.

The COURT.—I will admit it.

Defendants except.

Plaintiff's Exhibit No. 3 received in evidence and read to the jury as follows:

(Testimony of J. W. Martin.)

[Plaintiff's Exhibit No. 3.]

J. B. CARO & CO.,
Wholesale Agents.
Juneau, Alaska, Sept. 11th /05.

Mr. J. W. Martin, Haines.

Dear Sir: Replying to your favor of the 9th inst. would state that we sold our interest to Burford at his request for following reasons.

Could not get the launch in condition in time enough, and he had to get out at once in order to get the business owing to another scow having started to get ready for the same proposition. The third that the Seolin gets is what Burford purchased from us, and his giving them the interest is a good turn for him and you, as the Seolin furnish four men to fish, the catch of which four men goes to you and Burford as your interests appear.

Geo. has made some arrangement for the paying of the captain and firemen, of which we have not been advised. The Seolin is to do all towing, handling fish, ice and all necessary work whatever, and any moneys earned by the Seolin in whatever way for the next eight months or until the end of the season, you and Burford share and share alike. The profits on the boxes and store accrue to you and Burford. We reluctantly relinquish our interest, but owing to the fact that it would have worked a hardship on you and Burford, we gave the interest up as he desired. The store which we greatly wanted to put in, is now your and Burford's privilege, and Burford has a large store building at Farragut Bay in which to start

(Testimony of J. W. Martin.)

same. Undoubtedly Geo. has written to you the particulars, or intends to see you upon his return.

The launch, Burford took with him for the purpose of using as a barge to carry fish to scow, as he by that means obviates the expense of having to build a small scow.

We have numerous inquiries from fishermen since Burford left as to whether the store would carry halibut gear, fisherman's clothing, etc., and we would suggest that you put in a line of that class of goods.

They also say that they will purchase all their provisions from the store. We think the store will prove a better proposition than your Haines business.

We omitted to state that the Seolin are to board their own men, but are to get provisions from the store at cost.

As soon as Burford gets back, we will have him wire you and you can get together on the proposition.

We are sending you the box contract back and it will be a good thing to get the boxes. The mill will not get to work on them till it is signed up, and the boxes are worth 70¢ here at the mill in Juneau at all times of the year, and last winter, we paid as high as 1.30 per box.

Sincerely yours,

J. B. CARO & CO.

Per CARO.

Mr. BARNES.—Q. Do you know that signature?

A. Yes, sir.

Mr. HELLENTHAL.—We admit that signature as Mr. Caro's.

(Testimony of J. W. Martin.)

Mr. BARNES.—Q. Tell the jury what value you placed on the fishing business at the time you purchased this site for a store; what value you placed on it in your own mind when you made this purchase.

A. I didn't place any particular value on it any further than as it was connected with the furtherance of the business.

Q. What has been your business always?

A. Merchandise.

Q. State to the jury whether or not you knew anything about the fish business up to that time?

A. I knew nothing.

Q. What was your whole desire in the matter when you made this purchase?

Objected to by counsel for defendants as immaterial. Objection sustained.

Q. Now, state from what information you placed the value on the store that caused you to make the purchase.

A. From the statements of the defendants.

Q. And I would ask you if the writings helped you out any? A. Certainly.

Q. From the statements and writings of the defendants? A. Yes, sir.

Q. Now, this letter which was written and which we have read in evidence, kindly tell the jury whether that was before or after the $1,200.00 was paid?

A. It was before, I think.

Recross-examination.

Mr. HELLENTHAL.—Q. Isn't it a fact that you were not to have any interest in that store busi-

(Testimony of J. W. Martin.)

ness at all, that Caro & Co. were to have whatever business there was there, and wasn't that your agreement with Caro & Hooker?

Objected to by counsel for plaintiff, on the ground that the record is the best evidence. Objection overruled.

A. There was no agreement to that effect at all.

Q. It is a fact that up to the time that Caro & Co. got out of the business entirely and that this letter was written to you by Jules Caro, Caro & Co. were to run the store. Isn't that a fact?

Mr. BARNES.—We object to that. Their own answer says that Caro & Co. never had any interest in *their,* and they are bound by their answer.

Question withdrawn.

Mr. HELLENTHAL.—Q. Now, Martin, isn't it a fact, and you knew it all the time, that a store building at Farragut Bay, outside of the fishing business connected with it to make business for the store, is not worth one cent? Isn't that a fact, and didn't you know it all the time?

The COURT.—One question at a time.

Mr. HELLENTHAL.—Q. Isn't it a fact?

Objected to by counsel for plaintiff as indefinite and uncertain.

The COURT.—I think the question is definite enough. He withdraws one question and asks if it is not a fact that the store business there, without the fishing business would not be worth a cent.

Objected to by counsel for plaintiff as immaterial and because it is not shown that the witness knows. Objection overruled.

(Testimony of J. W. Martin.)

The COURT.—If he does not know, he can say so.

A. I relied upon their statement that the stores established there would be a profitable investment for the reason that other fishermen, something like twenty or twenty-five schooners were to make that their headquarters and we were to furnish them supplies.

Q. Now, before the other fishermen could make that their headquarters, you had to be there with that scow, the "Skagitt," didn't you?

Objected to by counsel for plaintiff as not recross-examination and immaterial. Objection sustained.

Mr. HELLENTHAL.—Excuse me for making this statement after your Honor has ruled. I want to prove that these boys went into the fish business down there. They were going to put that scow there not only to be used in the fishing business but were to use it as a wharf to take fish over, and then were going to run this little store in connection with the business.

The COURT.—I think that is your case.

Mr. HELLENTHAL.—By the way, you have changed your mind about that inventory, you say. Is that a fact? A. I stated so a while ago.

Q. You did get an inventory of that stuff, didn't you? A. Yes, sir, it is a matter—

Q. Just answer the question. You got the inventory? A. Yes, sir.

Q. You changed your mind after you saw that I had that letter of yours admitting that you had it, didn't you? A. I changed my mind, you say?

(Testimony of J. W. Martin.)

Q. Yes, sir.

A. No, sir, I didn't change my mind at all. It was something that had passed out of my mind. This fishing business didn't cut any ice. It was a side consideration as I have said.

Q. Have any other things that you have testified to or denied in this examination passed out of your mind that you know of?

A. Not that I recollect now.

Q. This would not have passed out of your mind and recurred had it not been for that letter that I showed to you, would it, Mr. Martin?

Objected to by counsel for plaintiff as a question for the jury to pass upon from the testimony. Objection sustained.

Q. Now, Mr. Martin, since you have got the inventory all right, I want you to tell us how much that Farragut Bay property was invoiced at in that inventory.

A. As near as I can make out, I have never had any inventory.

Q. Changing your mind again, are you?

A. That letter states that the inventory was lost and asking for another. Did I ever get it?

Q. Now, what is your understanding? What condition is your mind in now? Did you or didn't you have the inventory?

A. Evidently from that letter I had it and lost it and asked for another one. I never received it. Why didn't they furnish it?

(Testimony of J. W. Martin.)

Q. Why didn't they furnish it? Do they have to keep passing inventories to you?

The COURT.—That is argumentative.

Mr. HELLENTHAL.—Q. How much was that Farragut Bay property put into the inventory for, if you remember?

Mr. BARNES.—To which we object. It doesn't show it was put in for anything.

Objection overruled.

A. I don't remember what it was put in for.

Q. Wasn't it put in for $250.00?

A. It was not.

Q. That is a positive statement?

A. Yes, sir.

Q. How do you say it was not when you say you have no recollection as to what it was put in there for? How do you arrive at that conclusion?

A. Because the principal value of this property rested in the Farragut Bay site and store.

Q. There was very little value placed on all these other items, even in the inventory; is that true?

Mr. BARNES.—Now, if your Honor please, the question of value is a question that is bound by the pleadings. There is no value placed on this other property by the defendants nor by the plaintiff, and if a finding was to be made, which if it was tried before the Court would be made, it would be that it was of no value whatever. When they come into court they are bound by their pleadings. I say they cannot expect to establish proof of anything that is not alleged in their pleadings. The only value

(Testimony of J. W. Martin.)

that they alleged is what they alleged that the Farragut Bay property was worth, $250.00. I say they are bound by their answer and cannot change the value even if there was an inventory. The value in the inventory is not plead; it is not set up in their answer.

The COURT.—Whatever the inventory showed you may examine him on, with respect to the inventory, or the invoice.

Mr. BARNES.—May I ask the Court for what purpose that testimony may be introduced?

The COURT.—For the purpose of showing what was in his mind at the time he bought the property, at how much he valued the Farragut Bay property. The purpose of it is to show ultimately what he was buying, and by showing that, show the values that were fixed on the various articles.

Mr. BARNES.—Isn't this a question of law, that if an inventory was made when he was not present and did not participate in it, is he bound by it? He says this inventory was made out after he had signed the papers and when he was not present. Can they now say he was bound by it?

The COURT.—The inventory alone might not bind him, but other circumstances connected with it might bind him. When the evidence is in, if it does not appear material, I will strike it out. I overrule the objection.

Question read by stenographer.

A. Very little value placed on the rest of the outfit.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. What was the value placed on the Farragut Bay property in the inventory, if it wasn't $250.00?

Mr. BARNES.—Now, they are bound by their pleadings, and they cannot show in this testimony what value was placed in the inventory on that Farragut Bay property. In other words, they cannot cross-examine this witness to make out their own case.

The COURT.—Your contention is that this property is the principal value in the transaction. Now if it is possible to break this witness' testimony on that subject, I think it is proper. All that this cross-examination is going to is the witness' testimony on that subject.

Mr. BARNES.—It is not to go to the jury for the purpose of proving value?

The COURT.—No, I ruled on that last night.

Stenographer reads question.

A. I can't say that there was any definite value placed on it.

Mr. HELLENTHAL.—Q. You remember the inventory now perfectly well, don't you, Mr. Martin?

Objected to by counsel for plaintiff, as assuming a fact to exist that has not been testified to.

The COURT.—What do you mean?

Mr. HELLENTHAL.—Q. Whether you recall the circumstances of that inventory. You remember the circumstance of that inventory perfectly well now, don't you, Mr. Martin?

A. No, sir. I don't remember it perfectly well.

(Testimony of J. W. Martin.)

The COURT.—Q. Was there an inventory existing?

A. There was some sort of an inventory.

Mr. HELLENTHAL.—Q. Now, do you remember going to George Burford's house on the same day when this deal was executed, when you and he went over the inventory carefully item by item; do you remember that? A. I do not.

Q. Would you state that that didn't happen?

A. I don't think it did.

Q. You also state that that building and store site was not put in there at a valuation of $250.00?

A. It was not.

Q. Do you remember George Burford's explaining to you that his option was only for $225.00 owing to the fact that he had $25.00 worth of lumber here in Juneau that was to go into that building, so as to make it $250.00, and for that reason he would make it $250.00? Is that right?

Objected to by counsel for plaintiff as not proper cross-examination. Objection sustained.

Mr. HELLENTHAL.—Q. So the boys told you that was a better place to do business than your place at Haines?

Mr. BARNES.—We object to that. The writing is the best evidence. We only testified as to the writings.

Objection overruled. Objected to further by counsel for plaintiff as uncertain, as all the defendants are men, not boys. Objection sustained.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. So the defendants, consisting of George C. Burford, and Charles E. Hooker and Jules B. Caro comprising the firm of Caro & Co.—the last two named defendants told you that that was a better place to do business than at Haines? A. They did.

Q. And that was independent of the fact as to whether you had any scow there or not, that it was just a good business site there at Farragut Bay; is that what they told you?

Mr. BARNES.—We object to that. The letter speaks for itself.

Objection overruled.

A. Their statements would indicate that that was the state of affairs.

Mr. HELLENTHAL.—Q. It didn't make any difference whether you got down there with that big scow or not, that was a good business post anyway? Yes or no?

A. Yes, sir, and I am borne out by the fact of their taking the scow past.

Q. Now, you believed that, didn't you, Martin?

A. Believed what?

Q. You believed all that, that it was true, didn't you? A. Yes.

Q. You knew there was not a soul within fifty miles of Farragut Bay, didn't you?

A. I did not.

Q. You knew that was on the beach there where even an Indian would not frequent once in three years, didn't you?

(Testimony of J. W. Martin.)

Objected to by counsel for plaintiff as assuming a fact not in the evidence. Objection sustained.

Q. Now, Martin, isn't it a fact that this store business was just merely an incident in connection with the fish business, where you were going to carry fisherman's supplies to supply your own fishermen that were working for you and such other fishermen that would land there by reason of the fact that you would have your scow there and a place where steamers would call to take on fish?

Mr. BARNES.—We object to that. They are not permitted to come in and deny their own writing.

The COURT.—I overrule the objection. I think it is proper to show what was in the plaintiff's mind.

Mr. BARNES.—We call the Court's attention to the question. It involves several questions.

The COURT.—I think the question is prolix.

WITNESS.—I understand the question. I would hardly expect *to much* business with four fishermen.

Mr. BARNES.—That is not an answer to the question.

The COURT.—Reframe your question.

Mr. HELLENTHAL.—Q. You know how these little trading posts are carried on in connection with mines and things of that kind? A. Yes, sir.

Q. Now, wasn't it your purpose and the purpose of the defendants to put up a little store to sell things to your own fishermen and other fishermen that would come there to ship their product over your scow, place it on your scow to be taken by the large steamers from that point?

(Testimony of J. W. Martin.)

Mr. BARNES.—We object to that. It does not appear that there was any scow to be taken down there. He assumes a fact which is not in the evidence at all. The witness stated a moment ago that the scow was not there. It had been taken past there and never was there.

Objection sustained. Defendants except.

Mr. HELLENTHAL.—Q. Did you ever have any purpose in your mind, Martin, to run a store there at Farragut Bay, if there was no fishing scow there put there by yourself and George Burford and others, no fishing industry carried on there, independent in your mind of the fact of running the fish business there?

Mr. BARNES.—We object to that as containing two questions.

The COURT.—What he means is if there was no fishing business carried on there by anybody.

Mr. HELLENTHAL.—No, your Honor, that is not my meaning. By himself and these defendants.

Mr. BARNES.—Then we object to it.

Objection sustained.

Mr. HELLENTHAL.—Q. Could anybody fish there until that scow had been placed there, so he would have a place to ship goods over for the big steamers to take them off of?

Mr. BARNES.—We object to that. The witness is not an expert in that business.

The COURT.—Other people might have put a scow in there.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. Was there any scow north of Seattle that could do that business except the "Skagitt"?

Objected to by counsel for plaintiff, as assuming to make an expert out of the witness when he says he knows nothing about the fish business. Objection sustained.

Whereupon Court adjourned until two o'clock P. M.

February 21, 1908, at 2 o'clock P. M.

J. W. MARTIN, being recalled on recross-examination, testified as follows:

Mr. HELLENTHAL.—Q. Mr. Martin, you say the defendants told you you would do more business down there at Farragut Bay than you would at Haines? That is right, isn't it?

A. Yes, sir.

Mr. BARNES.—The letter speaks for itself.

Objection overruled.

Mr. HELLENTHAL.—Q. You stated your business at Haines was worth $15,000 a year, or about that. A. That is about right.

Q. That was in the year 1905 when you had this transaction?

Q. And your business in 1906 was also worth $15,000 a year.

Objected to by counsel for plaintiff as immaterial. Objection sustained.

Q. What was your business worth in 1904?

Objected to by counsel for plaintiff as immaterial. Objection sustained.

(Testimony of J. W. Martin.)

Q. Now, in 1905 you paid a Government license, didn't you, Mr. Martin, for doing business at Haines?

Mr. BARNES.—It is immaterial whether he paid a Government license or not. That is no indication that he did not do the business, and it is not cross-examination.

Mr. HELLENTHAL.—I propose to show by him by his own statements that he has made different statements at other times.

The COURT.—I think that is admissible. I overrule the objection.

Question read by stenographer.

A. Yes, sir.

Mr. HELLENTHAL.—Q. You swore in your application for a license for that year that your business did not exceed $4,000, didn't you, Mr. Martin?

The COURT.—What time of the year, and where?

Mr. HELLENTHAL.—Q. The application filed by you in the office of the U. S. Clerk of the Court for this district, who is also ex-officio Collector of Taxes, for the business you did at Haines during the years 1904 and 5.

Mr. BARNES.—What time in the year did he make that affidavit? We want the date of the affidavit.

Objection overruled.

Mr. BARNES.—Our transaction was in August, 1905, that we were doing a business of $15,000 a year. Maybe in August, 1904, we were not doing that much business.

(Testimony of J. W. Martin.)

The COURT.—It is the license for that year, the year 1904-5, is that it?

Mr. HELLENTHAL.—That is it.

The COURT.—It must include the year on which he bases his statement. He states, as I remember it, that he was doing a business of $15,000 a year at that time. Any statement which he may have made within that period, or any tax which he may have paid indicating the amount of business which he did, would be material.

Mr. BARNES.—This was in September, I think.

The COURT.—Anything for that year would be material.

Mr. BARNES.—Do you mean the calendar year or the fiscal year?

The COURT.—I mean the fiscal year. I think at that time the licenses were being issued on the 1st of July.

Mr. BARNES.—By law, the affidavit is not required to state the business that he was doing but the business that he had done.

The COURT.—The business that he expected to do. I think you should exhibit the application to him.

Clerk produces license application from Clerk's office. Application marked for identification Defendants' Exhibit "B."

WITNESS.—May I ask if the Clerk has any more of these applications, that is, for business done in any other places, that is branch stores. That comes in under this same head.

(Testimony of J. W. Martin.)

The COURT.—That I do not know. You might conduct a business down here and one at Skagway, and it would not be the same one.

Mr. BARNES.—He means, I suppose, that the whole business was worth $15,000 a year. I submit to the Court that he has a right to show where that business was done.

The COURT.—You have a right to show that on redirect examination, if you like.

Mr. HELLENTHAL.—Q. You did then make an affidavit to the effect that your Haines business in that year was less than $4,000 a year?

Mr. BARNES.—We object to it. There is no affidavit in evidence to that effect. If he has not offered it in evidence, he cannot testify as to the contents of it.

The COURT.—The proper time to offer it is in his own case. I think it is a proper question to affect the credibility of the witness. That is the only purpose he can ask it for.

Mr. BARNES.—There has been no tender of the paper to offer it in evidence. There can be no testimony regarding the contents of it if he does not introduce it in evidence.

The COURT.—I think he may be examined on the contents of it at this time. I think it is proper.

Mr. BARNES.—Without introducing it in evidence?

The COURT.—Yes, sir.

Stenographer reads question.

(Testimony of J. W. Martin.)

Question further objected to by counsel for plaintiff, as assuming a fact not in the evidence.

The COURT.—Ask him if he did.

Mr. HELLENTHAL.—Q. Did you make an affidavit that your business in that year did not exceed $4,000, in the year 1904-5? A. Yes, sir.

Q. Did you make an affidavit that your business in the following year did not exceed or was less than $10,000?

The COURT.—Show him the affidavit.

Witness is shown affidavit.

WITNESS.—If your Honor please, may I ask this. I have conducted a business there—

The COURT.—I think you had better testify to the questions and then talk to your counsel, and if there is anything he wants to correct or any explanations you want to make, it is your privilege to do so on redirect examination.

Mr. BARNES.—Wouldn't he have a right to say at this time if there were other businesses he wanted to include in this?

The COURT.—I think all the witness should do at that time is to answer the questions asked him. If there is any explanation which he desires to make, that is a proper subject for your inquiry on redirect examination.

Of course these applications must be offered in evidence in the defendants' case, else the testimony will be stricken.

License application sworn to July 11, 1905, marked for identification Defendants' Exhibit "C."

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. I hand you here a paper marked for identification Defendants' Exhibit "C." I will ask you to look at it and state if that is your signature, and if you made that affidavit?

A. Yes, sir.

Q. Did you then make an affidavit for the year covered by that affidavit, 1905-6, that your business at Haines did not exceed $10,000?

Mr. BARNES.—We object to that and say that that mode of examination is not fair. If he wants to introduce his evidence, let him do it, and let the affidavit speak for itself.

Objection overruled.

A. I think I answered that a minute ago, didn't I?

The COURT.—No, that was another question.

Mr. HELLENTHAL.—Q. Say yes or no.

A. Yes, sir.

Application for License dated June 18, 1906, marked for identification Defendants' Exhibit "D."

Q. I hand you here a paper marked Defendants' "D" for identification, and ask you to look at it and state if that is your signature to the application and affidavit on that paper? A. Yes, sir.

Q. Did you make an affidavit for that year, 1906, that your business did not exceed $10,000 in the Town of Haines?

Mr. BARNES.—To which we object, because it is not the year in question. The year in question is 1905; August, 1905, his probable business for the year following.

(Testimony of J. W. Martin.)

The COURT.—It has a tendency to prove the average amount of business from year to year, unless of course he can explain that the business has fluctuated. I overrule the objection.

A. This one branch of my business did not.

The COURT.—Q. At Haines?

A. This branch of my business at Haines did not exceed $10,000 that year.

Mr. HELLENTHAL.—Q. Did you have any other business at Haines?

A. I had other business at—

Q. Yes or no.

A. The business was conducted at Haines.

Q. Did you have any other business at Haines? Answer my question.

The COURT.—Answer the question, if you had any other business at Haines. A. No, sir.

Mr. HELLENTHAL.—I ask that that paper, application, dated July 18, 1907, be marked for identification.

The COURT.—I think that is too remote.

Mr. HELLENTHAL.—Q. Now, Mr. Martin, I wish you to tell me when you told the truth, on the occasion that you signed those affidavits or on the occasion that you said your business at Haines was worth $15,000 a year, on the witness-stand here?

The COURT.—I suggest that you change the form of the question. Ask him which is correct.

Mr. HELLENTHAL.—Q. Which is correct, Mr. Martin, the statements you made in the affidavits or the statements you made here on the witness-stand?

(Testimony of J. W. Martin.)

A. I stated that my business amounted at that time to $15,000.

Q. And is that correct?

A. And the business at Haines and conducted from that point is what I referred to at that time.

Q. You didn't have reference particularly to the business at Haines, Mr. Martin?

Mr. BARNES.—I suggest that his answer does not call for such a question at all. He said the business at Haines and conducted from the Haines store.

Question withdrawn.

Mr. HELLENTHAL.—Q. Mr. Martin, how many places of business did you have in the year 1905?

A. I had one.

Q. And that was the place for which you took out the license?

A. Yes, sir, that is one of the places.

Q. That was the place at Haines for which you took out a license, was it not, Mr. Martin?

A. Yes, sir.

Q. These defendants told you that this business would be better than your business at Haines, did they not?

A. I think this letter stated so.

Q. And you stated this morning that your business at Haines amounted to $15,000 a year, did you not? A. About.

Q. And that statement was true; that is a fact?

A. Yes, sir.

Q. Correct, I mean? A. Yes, sir.

(Testimony of J. W. Martin.)

Q. And the statement in your license application then is in error. Is that the way you wish to be understood? A. No, sir.

Q. That is also correct? A. Yes, sir.

Q. In your mind there is no difference between $4,000 and $15,000, Mr. Martin?

Mr. BARNES.—Now, if your Honor please, there is no question about $4,000 and $15,000 at the same time.

Mr. HELLENTHAL.—I will offer all those affidavits in evidence now, your Honor, so there will be no dispute about it.

Mr. BARNES.—I object to this first one, in 1904, because it is too remote. The affidavit was made in 1904, if you please, so it must have been for the year ending June 10, 1904.

The COURT.—I will admit it.

Mr. BARNES.—The next one, June 11, 1905, that is for business before that referred to in his testimony this morning. It was for business ending June 11, 1905, and the testimony that he testified to this morning was for August, 1905. The next one, 1906, we cannot object to.

The COURT.—I think they were all estimated on the business for the ensuing year, based upon the business done in the preceding year.

Mr. BARNES.—The law says that it is business based on business done in the last three months. That is the affidavit, the past three months.

The COURT.—I will admit them.

Defendants' Exhibits "B," "C" and "D" received in evidence.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. Mr. Martin, these licenses were paid in advance, were they not?

A. Yes, sir.

Q. The license that was paid in June, 1904, was for the year 1904-5; that is, for the ensuing year?

A. Yes, sir.

Q. So the one paid in 1905 was for the year 1905-6? A. Yes, sir.

Q. The license you paid in 1905 is for business of 1905-6? A. Yes, sir.

The COURT.—Q. That is for the fiscal year, not the calendar year? A. Yes.

Defendants' Exhibit "B" read to the jury, as follows:

[Defendants' Exhibit "B."]

APPLICATION.

To the U. S. District Court, District of Alaska, Division No. 1:

Haines, Alaska, ..., 190....

I, J. W. Martin, of Haines, Alaska, do hereby make application for a Mercantile License, to wit:

Gen. Store, situated at Haines, Alaska, for one year from the first day of ....., 190...., and that the amount of business done does not exceed $4000.00 Dollars per annum. That my books will at all times be open to inspection by the Clerk of the U. S. District Court.

Signed: J. W. MARTIN.

(Testimony of J. W. Martin.)

United States of America,
District of Alaska,—ss.

J. W. Martin, being first duly sworn according to law, says: I have read the foregoing application for a license signed by me, and the same is true in all respects.

Signed: J. W. MARTIN.

Subscribed and sworn to before me this 10th day of June, 1904.

[Notarial Seal] W. B. STOUT,
Notary Public in and for the District of Alaska.

[Endorsed]: No. 620 "O." $10.00. Mercantile. Filed Jun. 14, 1904. W. J. Hills, Clerk. By ————, Deputy.

Defendants' Exhibit "C" read to the jury, as follows:

[Defendants' Exhibit "C."]

APPLICATION.

Approved Jul. 17, 1905.
ROYAL A. GUNNISON,
Judge.

To the U. S. District Court, District of Alaska, Division No. 1:

Haines, Alaska, Jul. 7, 1905.

I, J. W. Martin, of Haines, Alaska, do hereby make application for a Mercantile License, to wit:

For carrying on the business of Gen. Mdse., situated at Haines, Alaska, for one year from the first day of July, 1905, and that the amount of business does not

(Testimony of J. W. Martin.)

exceed Ten thousand Dollars per annum. That my books will at all times be open to inspection by the Clerk of the U. S. District Court.

Signed: J. W. MARTIN.

United States of America,
District of Alaska,—ss.

J. W. Martin, being first duly sworn according to law, says: I have read the foregoing application for a license signed by me, and the same is true in all respects.

Signed: J. W. MARTIN.

Subscribed and sworn to before me this 11th day of July, 1905.

[Notarial Seal] W. B. STOUT,
Notary Public in and for the District of Alaska.

$25.00 O.K., Jul. 15, 1905.

[Endorsed]: No. 875 "O." $25.00. Mercantile. Filed Jul. 18, 1905. C. C. Page, Clerk. By A. L. Collison, Ass't.

Defendants' Exhibit "D" read to the jury, as follows:

[Defendants' Exhibit "D."]

APPLICATION.

Approved Jun. 25, 1906.

ROYAL A. GUNNISON,
Judge.

To the U. S. District Court, District of Alaska.

Haines, Alaska, June 18th, 1906.

I, J. W. Martin, of Haines, Alaska, do hereby make application for a license for a Mercantile Establish-

(Testimony of J. W. Martin.)

ment, to wit: situated on Main Street in the Town of Haines, Alaska, for one year from July 1st, 1906, and certify that after a careful examination of my books, as to the amount of business done in my store, the past three months, that I am doing a business of less than Ten Thousand Dollars per annum.

Signed: J. W. MARTIN.

United States of America,
District of Alaska,—ss.

I, J. W. Martin, being first duly sworn according to law, says: I have read the foregoing application for a license signed by me, and the same is true in all respects.

Signed: J. W. MARTIN.

Subscribed and sworn to before me this 18th day of June, 1906.

[Notarial Seal] W. B. STOUT,

Notary Public in and for the District of Alaska.

Jun. 20, 1906.
Rec'd 25.00.

[Endorsed]: 1115-O. J. W. Martin. Gen'l Mdse. Haines. Filed Jun. 26, 1906. C. C. Page, Clerk. By D. C. Abrams, Deputy.

Whereupon, a recess of 10 minutes was taken.

J. W. MARTIN, being recalled, testified as follows:

Redirect Examination.

Mr. BARNES.—Q. Now, Mr. Martin, this morning you testified that your Haines business—or rather the letter we introduced refers to your Haines

(Testimony of J. W. Martin.)

business, and then you testified that that business amounted to about $15,000 a year. Now, I ask you how much license you paid for the business included in your statement this morning as the Haines business for that year that you testified that your business amounted to $15,000?

Objected to by counsel for defendants on the ground that the application for license is the best evidence.

The COURT.—Offer the application.

Mr. BARNES.—(Showing application to witness.)

Q. Is that your signature to this affidavit, Mr. Martin?

A. No, sir, but this is a branch of my store.

Q. Is this your signature to this other one?

A. Yes, sir.

Application for license sworn to September 18, 1905, for general merchandise business at Kluckwan, marked for identification Plffs. Exh. No. 4.

Application for license at Chilkoot, sworn to July 11, 1905, marked for identification Plaintiff's Exhibit No. 5.

Mr. BARNES.—We didn't find the licenses for the year 1904 and the other year which you let them introduce.

The COURT.—We will take a further recess then.

Whereupon, a recess of ten minutes was taken.

Mr. BARNES.—We now offer in evidence the application for license marked by the reporter for identification No. 4, for the year covering the time testified to by the witness this morning, to wit, that

(Testimony of J. W. Martin.)

at the time this letter was received, which is 1905, that year his business amounted to $15,000. Now there is already in evidence one license for that year showing $10,000. We offer this license to show $4,000 at Kluckwan, making $14,000, and we propose to show by this witness that that store at Kluckwan is part of the Haines business. If the Haines business were sold out, that business would go with it, and he referred to that in his testimony this morning. It is always understood by the Mercantile—

The COURT.—Suppose, without arguing the case, you simply offer this. I understand what it is offered for.

Mr. HELLENTHAL.—The defendants object to receiving in evidence Plaintiff's Exhibit No. 4, for identification, on the ground that it is incompetent, irrelevant and immaterial; that the exhibit purports to be an application for a license of one, Philip Shortridge, and not a license applied for by the plaintiff; and for the further reason that the only matter under discussion germane to the issue is the amount of business done at Haines, and this purported application for a license is for a license for another and different business, at another place, to wit, the place of Kluckwan.

(After argument.)

Objection sustained. Plaintiff excepts.

Mr. BARNES.—Q. Mr. Martin, where do the profits go to from that Kluckwan store?

Mr. HELLENTHAL.—We have to object to that for the same reason.

(Testimony of J. W. Martin.)

The COURT.—You have not proven his connection with any store at Kluckwan.

Mr. BARNES.—Q. Do you own a store at Kluckwan that is run by Philip Shortridge?

Objected to by counsel for defendants as leading. Objection sustained.

Q. Who owns the store at Kluckwan conducted by Philip Shortridge?

A. I owned it at that time.

Q. Where were you doing business at that time?

Mr. HELLENTHAL.—We interpose the further objection to that it is immaterial where, if not at Haines.

Objection overruled.

Mr. BARNES.—Q. Where were you doing business at that time? A. At Haines.

Q. I will ask you where the profits of the Kluckwan store came to at that time?

A. They came to me at Haines.

Q. At the Haines store? If there were losses in the Kluckwan store, where would those losses be borne?

A. They would certainly revert to me.

Q. Who paid the money to the United States for this license issued for Kluckwan at that time?

Mr. HELLENTHAL.—We object to that, your Honor, for the reason that the application for license must always be made to the person that owns the property. If this business is actually the property of Mr. Martin, then Mr. Shortridge did not exactly tell the truth when he made the application.

(Testimony of J. W. Martin.)

The COURT.—I do not think it is material. You have already testified that he was the owner of the property at Kluckwan and that Shortridge was his agent. I do not think it makes any difference who paid it. You have shown that he stood the losses and received the profits.

Mr. BARNES.—I offer in evidence now the license for the conducting of that business at Kluckwan to sustain the statement that he made this morning that his business amounted to $15,000.

Mr. HELLENTHAL.—We object to it. It has nothing to do with the question before this Court. It is immaterial.

Objection overruled.

Plaintiff's Exhibit No. 4 received in evidence, and read to the jury as follows:

[Plaintiff's Exhibit No. 4.]

APPLICATION.

Approved Oct. 21, 1905.

ROYAL A. GUNNISON,
Judge.

To the U. S. District Court, District of Alaska.

Kluckwan, Alaska, Sept. 12, 1905.

I, Phillip Shortridge, of Kluckwan, Alaska, do hereby make application for a license for a Mercantile Establishment, to wit, General Merchandise (Grocery), situated at Kluckwan (via Haines), Alaska, for one year from July 1st, 1905, and certify that after a careful examination of my books, as to the amount of business done in my store, the past

(Testimony of J. W. Martin.)

three months, that I am doing a business of less than four thousand dollars per annum.

Signed: PHILLIP SHORTRIDGE.

United States of America,
District of Alaska,—ss.

Phillip Shortridge, being first duly sworn according to law, says: I have read the foregoing application for a license signed by me, and the same is true in all respects.

Signed: PHILLIP SHORTRIDGE.

Subscribed and sworn to before me this 18th day of September, 1905.

[Notarial Seal] W. B. STOUT,
Notary Public in and for Alaska.

Sep. 25, 1905.
$10.00. O. K.

[Endorsed]: No. 947—"O." $10.00. Filed Oct. 26, 1905. C. C. Page, Clerk. By ————, Deputy.

Mr. BARNES.—Mr. Martin, who owned the business at Chilcoot during the year 1905, of which you testified this morning that your Haines business amounted to $15,000 a year? Who owned the business at Chilcoot at that time?

Objected to by counsel for defendants as immaterial and leading.

The COURT.—Don't lead him. Let him testify where these businesses are.

(Testimony of J. W. Martin.)

Mr. BARNES.—Q. What other business belonging to the Haines business did you have during that year outside of the business at Kluckwan?

A. Another branch at Chilcoot.

Objected to by counsel for defendants as immaterial. Objection overruled. Defendants except.

Q. I will ask you what store stood the losses of that Chilcoot store. A. The Haines store.

Q. What store got the profits of it?

A. The Haines store.

Q. I will ask you if you included that store in your statement this morning that the business amounted to $15,000 a year, together with the branch at Kluckwan, as your Haines business.

Mr. HELLENTHAL.—We object. The statement stands for itself.

Objection overruled.

A. Yes, sir.

Q. In case, Mr. Martin, you were to sell out at Haines, state whether or not these Kluckwan and Chilcoot branches would go with the Haines business?

Mr. HELLENTHAL.—That is objected to because it calls for a prophecy.

The COURT.—It calls for an opinion of the witness.

Mr. BARNES.—We now offer the application for license for the Chilkoot business in evidence.

Mr. HELLENTHAL.—I object to that offer because it is immaterial, the question for determination

(Testimony of J. W. Martin.)

being what business he did at Haines, this purporting to be an application for a license in another and different place, to wit, Chilkoot.

The COURT.—It may be received. I think it is a question of fact for the jury to determine.

Plaintiff's Exhibit No. 5 received in evidence, and read to the jury, as follows:

[Plaintiff's Exhibit No. 5.]

APPLICATION.

Approved, July 17, 1905.
ROYAL A. GUNNISON,
Judge.

To the U. S. District Court, District of Alaska, Division No. 1:

Haines, Alaska, Jul. 7, 1905.

I, J. W. Martin, of Haines, Alaska, do hereby make application for a Mercantile License, to wit:

For carrying on the business of Gen. Merchandise, situated at Chilkoot, Alaska, for one year from the first day of July, 1905, and that the amount of business done does not exceed Four thousand dollars per annum, That my books will at all times be open to inspection by the Clerk of the U. S. District Court.

Signed: J. W. MARTIN.

United States of America,
District of Alaska,—ss.

J. W. Martin, being first duly sworn according to law, says: I have read the foregoing application for

(Testimony of J. W. Martin.)

a license signed by me, and the same is true in all respects.

Signed: J. W. MARTIN.

Subscribed and sworn to before me this 11 day of July, 1905.

[Notarial Seal] W. B. STOUT.

Notary Public in and for the District of Alaska.

$,0.00 O. K. Jul. 15, 1905.

[Endorsed]: No. 874-O. $10.00. Mercantile. Filed Jul. 18, 1905. C. C. Page, Clerk. By A. L. Collison, Ass't.

Mr. BARNES.—Q. Mr. Martin, how much business were you paying license for during the year 1905?

Mr. HELLENTHAL.—We object. He might have business in Seattle for all we know.

Mr. BARNES.—Q. For that Haines business that you testified about this morning?

Mr. HELLENTHAL.—We object. The license itself is the best evidence. The license that he paid for Haines shows for itself.

Objection sustained.

Q. How much did you pay for the home store that year?

Counsel for defendants interposes the same objection as to the last question.

The COURT.—If you want to show that he paid anything different from what appears in the license application, you may show that. Anything that does not appear on the face of it may be shown.

(Testimony of J. W. Martin.)

Mr. BARNES.—I thought I would have a right to show that he paid for different stores. That is what I want him to tell the jury what he paid for the different stores.

The COURT.—You already have it in evidence. If you want to ask him how much license fees he paid altogether to the United States in that year, I think you may ask that.

Mr. BARNES.—On how much business did you pay a license for that year, 1905, to the United States which you included in your testimony this morning, when you said you did a $15,000 business?

A. I think I paid on $18,000.

The COURT.—Q. Did you have a business at Kluckwan in 1904-5, the fiscal year 1904-5, from July 1st, 1904, to June 30th, 1905?

A. Yes, sir; it was run for me.

Q. And one at Chilkoot? A. Yes, sir.

Q. Who operated the Kluckwan store?

A. Phillip Shortridge.

Q. And the Chilkoot store?

A. An Indian by the name of Charlie Joe and his wife.

Q. And the year before that, 1903-4?

A. There was no store there before that time.

Q. In either place?

A. No, sir, not that I know of.

Q. Your store there began in the year 1904-5?

A. Yes, sir.

(Testimony of J. W. Martin.)

Recross-examination.

Mr. HELLENTHAL.—Q. So, Mr. Martin, when you stated this morning that your Haines business was worth $15,000, you meant to say that your Haines business, your Kluckwan business and your Chilkoot business altogether amounted to $15,000. Is that what you meant?

A. Substantially so; yes, sir.

Q. Well, is that exactly what you meant?

A. Yes, sir.

Q. Now, why did you call the Kluckwan business Haines business, and why did you call the Chilkoot business, *Haines business Haines business?*

Mr. BARNES.—I object. Let him answer one question before he asks another.

Question withdrawn.

Mr. HELLENTHAL.—Q. How far are Kluckwan and Haines apart? A. 25 miles.

Q. And the store situated at Kluckwan would hardly be a store within the confines of the town of Haines?

Mr. BARNES.—I object to the answering of the question because it is a fact that the Court will take judicial knowledge of.

Objection sustained.

Mr. HELLENTHAL.—Q. The Chilkoot business, how far is that from Haines, six miles?

A. Something like that. Less than ten.

Q. What is it—Chilkoot Harbor?

A. Chilkoot Inlet.

(Testimony of J. W. Martin.)

Q. When did you start that store in Chilkoot Inlet?

Objected to by counsel for plaintiff as immaterial and not proper cross-examination.

The COURT.—I think it is admissible for the purpose of showing what the business was. These affidavits are not made on the business for the year for which they are paid. They are made on the business for the preceding year, and for that reason I think it is proper to show what that business was. I think it is proper cross-examination.

Mr. BARNES.—That affidavit that was made in July, 1905, swears that his business amounted to so much.

The COURT.—It is merely an estimate. Now, if counsel wants to show that he did not actually do that business, that is admissible.

Mr. BARNES.—Why does he go back a year before, when his affidavit only says three months?

The COURT.—I overrule the objection.

Question read by stenographer.

A. July, I think it was; 1905.

Mr. HELLENTHAL.—Q. When did you start the store at Kluckwan?

A. I think it was the same year.

Q. Previous to that time you had no store except the Haines store?

The COURT.—I thought you answered me that you started out at Kluckwan and Chilkoot in 1904. Be careful that you understand the question.

(Testimony of J. W. Martin.)

A. Well, the license here covers that.

Examination of witness by the Court read by stenographer.

The COURT.—You have made a mistake one time or the other, either answering my questions or Mr. Hellenthal's.

A. Well, what was that last question?

The COURT.—That last question may be stricken. I think he is mistaken on one or the other of those statements.

WITNESS.—July, 1905, I started them.

The COURT.—Q. The answer you gave me, then, that these other stores were commenced in July, 1904, you were mistaken when you said that?

A. Yes, sir.

Mr. HELLENTHAL.—Q. You state now that you commenced in 1905 those two other stores?

A. I commenced this Kluckwan store. That is the one you asked about.

The COURT.—And the other one, too?

A. Yes, sir.

Mr. HELLENTHAL.—Q. Both stores?

A. Yes, sir.

Q. You commenced them both at the same time?

A. The same year.

Q. Did you ever tell these defendants anything about your having these other two stores?

Objected to by counsel for plaintiff as immaterial and not proper cross-examination. Objection sustained.

(Testimony of J. W. Martin.)

Q. Mr. Martin, you included that Kluckwan business in your Haines business, in your estimate, you say. Is that true, when you estimated the $15,000 worth of business at Haines? A. Yes, sir.

Q. That was run by Phillip Shortridge?

A. Yes, sir.

Q. Have you any other business scattered around this country run by any other people which you included in that statement, B. M. Behrends business, for instance?

Objected to by counsel for plaintiff as immaterial and insulting to the witness.

The COURT.—I think it is immaterial.

Mr. HELLENTHAL.—The business down at Chilkoot that was also included in this business, the $15,000 business, was it?

Objected to by counsel for plaintiff as prolonging the examination unnecessarily. Objection overruled.

A. Yes, sir.

Q. Now, give me some reason why a business at Chilkoot or a business at Kluckwan should be any part of a business at Haines?

A. When the profits revert to me at Haines, I do not see why it would not be part of the business at Haines.

Q. The reason was, then, because the same man owned the three stores? A. Yes, sir.

Q. You owned each store at those three different places. That is true, is it? Yes or no.

The COURT.—He has already testified to that.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. Did you have any other or different kind of ownership in the store at Haines than you had in the store at Kluckwan or the store at Chilkoot?

A. I owned the store at Haines solely by myself, and the others were branches.

Q. Were other parties interested with you in the other stores? A. Yes, sir.

Q. They were not any part of your individual business, were they? A. They certainly were.

Q. Were the other parties interested with you at Haines?

A. They weren't interested with me individually, no.

Q. Were they interested with you collectively or any otherwise except individually?

The COURT.—Q. What he wants to know is did you have the entire interest in the Kluckwan store and the entire interest in the Haines store, or was there someone else who had an interest in them?

A. I had the entire interest in the Haines store, and the other two branches were partnerships.

Mr. HELLENTHAL.—Who were in the Kluckwan store then?

A. Martin and Phillip Shortridge.

Q. What interest in that store did you have, Mr. Martin?

A. I furnished the goods and received one-half of the profits.

Q. One-half interest?

(Testimony of J. W. Martin.)

Mr. BARNES.—No, one-half of the profits.

Mr. HELLENTHAL.—Q. How large was your interest in the Kluckwan store? Did you own one-half, two-thirds, or the whole, or how much?

A. I owned it all.

Q. Then it was not a partnership store at all?

Mr. BARNES.—That is a question of law as to partnership. He can state the facts.

The COURT.—State what the facts were in relation to it.

A. The Indian ran the store for one-half of the profits for the sale of the goods.

Mr. HELLENTHAL.—Q. You furnished the goods? A. Yes, sir.

Q. The Indian had no interest in the store at all?

A. I furnished the stock.

Q. The goods were shipped up there from Haines?

A. Yes, sir.

Q. Who had an interest in the Chilkoot store?

A. Charlie Joe.

Q. What interest did he have in the store?

A. He had no interest in the store.

A. He had no interest in the store. He ran the store on the same lay as the other.

The COURT.—What was that?

A. I furnished the goods and gave him a half interest in the profits for running the store.

Q. Suppose there were losses, what happened then? A. I stood all the losses.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—Q. Now, if one should ask you how much your Kluckwan business amounted to, you would then also say it amounted to $15,000, on the same plan, wouldn't you, Mr. Martin?

Objected to by counsel for plaintiff, as immaterial. Objection sustained.

Mr. HELLENTHAL.—Q. Mr. Martin, you were going to start a branch store at Farragut Bay, weren't you?

Mr. BARNES.—When, if you please?

Mr. HELLENTHAL.—Q. In connection with this deal, after the deal had been closed, to start a branch store. That was the purpose of it, wasn't it?

Objected to as immaterial, by counsel for plaintiff. Objection sustained.

Mr. HELLENTHAL.—I want to show that this witness was quibbling. I will show it by his own testimony.

Same objection. Objection sustained.

Q. Is there any reason why your store at Kluckwan was part of your Haines business that would not equally apply and make your store at Farragut Bay a part of your Haines business?

Objected to by counsel for plaintiff, as calling for the opinion of the witness and not cross-examination.

The COURT.—I will sustain the objection. It is not cross-examination, and not material.

Mr. BARNES.—Q. State whether or not this share of the profits that these Indians got was in lieu of wages to be paid them?

(Testimony of Jules B. Caro.)

A. It was in lieu of wages.

Q. You paid them no wages then? In lieu of wages you give them a share of the profits?

A. Yes, sir.

[Testimony of Jules B. Caro, for Plaintiff.]

JULES B. CARO, called as a witness for the plaintiff, being first duly sworn, on oath, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Mr. Caro, what is your financial condition?

Objected to by counsel for defendants as immaterial.

The COURT.—For the purpose of showing the amount of exemplary damages?

Mr. BARNES.—Yes, sir, your Honor.

Mr. HELLENTHAL.—I want to object to it for the further reason that there is not a scintilla of evidence before this Court that would entitle them to exemplary damages. There must be a basis for exemplary damages. It is true if there was proof upon which exemplary damages could be recovered, such a question might be pertinent, but there is not a scintilla of evidence to sustain a judgment for exemplary damages.

Objection overruled. Defendants except.

Mr. BARNES.—Q. What is your financial condition? A. My financial condition now?

Q. Certainly.

A. Well, I would say I was not worth anything right now.

(Testimony of Jules B. Caro.)

Q. Why?

A. Because I think I owe pretty nearly everything I have got.

Q. What property have you got?

The COURT.—Personal or real?

A. I haven't any.

Mr. BARNES.—Q. None at all?

A. Except my clothes.

Q. Do you own any notes payable to yourself?

A. No.

Q. Have you any real estate?

A. I have interests—

Mr. HELLENTHAL.—We object to all these questions on the ground that they are immaterial.

Objection overruled.

Mr. HELLENTHAL.—We ask exceptions to all of them, your Honor.

The COURT.—Yes, sir.

Mr. BARNES.—Q. What real estate have you?

A. I have an interest in a business building.

Q. How much is that interest worth?

A. That is a question that I cannot state how much it is worth.

Q. In your best judgment, how much is it worth?

A. I should judge that to be worth—your Honor, would that be at forced sale?

The COURT.—On the market, an ordinary sale.

A. In an ordinary sale, that would be worth about, building and all, $12,000, more or less.

The COURT.—Q. You don't mean your interest?

A. No, the entire building.

(Testimony of Jules B. Caro.)

Mr. BARNES.—Q. I am not referring to the Hooker & Caro property at all. To be fair with you, I want you to say how much your own, private, property is worth.

A. I have nothing in any property outside of that excepting an interest in three lots at Skagway that were deeded to me when they should have been deeded to both of us, and I have not made the re-deed. They are worth about $300.00.

Q. Have you some mining property?

A. No, nothing individual.

Q. Don't you own some property up here on Gold Creek? A. I don't own it individually.

Q. You own an undivided interest in it, don't you?

A. There is a deed from Sam Kohn to me, but whether I have re-deeded to Mr. Hooker or not I don't know.

Q. Does not the deed stand in your own name now?

The COURT.—The deed is the best evidence of the record.

A. I don't remember whether I transferred any interest to Mr. Hooker in that or not.

Mr. BARNES.—Q. Then you say you are insolvent individually?

A. Yes, I am insolvent. If I would have to pay all my own individual debts to-day, I probably would be insolvent.

Q. Then, how much is the firm of Hooker & Caro worth?

(Testimony of Jules B. Caro.)

A. You mean in the gross, or after our debts are paid?

Q. Certainly after your debts are paid.

A. Well, I will have to figure. I should judge if we could pay our debts to-day, we would probably have about $8,000, or over.

The COURT.—Q. You mean the firm?

A. Yes.

Q. If you went into liquidation to-day, you would probably have $8,000? A. Yes, sir.

Mr. BARNES.—Q. Then the extent of the business of Caro & Co., and the extent of their whole worth does not exceed $8,000?

A. I don't believe it would.

Q. How much business do you do here?

A. Last year we drew something like $13,000.

Q. Profits?

A. No, that was our gross receipts.

Q. And the year before?

A. I can't remember that. That was something in that neighborhood, probably less, but I can't remember it.

Q. You have been in business for how long?

A. We have been in business since, I think it was 1902, five years. A little over five years.

Q. Has the business averaged $10,000 a year since you have been in it?

A. No, I don't think it has been that. The gross business may have been, but I can't say offhand.

Q. How much was the net profits? Now this is the net profits.

(Testimony of Jules B. Caro.)

A. This past year our real net profits, as far as our business concerned, were nothing, because we sustained some very heavy losses that more than offset it.

Q. You say so far as your business is concerned. Do you have any other way of making profits except your business?

A. No. I meant in this way, that we have sustained losses that have not been entered up yet, and the profits which we got in the past year will go to pay those losses.

Q. So that the year 1907 was a blank to you so far as profits are concerned? A. Yes.

Q. In 1906, how much were the profits?

A. I can't remember that. In that neighborhood anyway.

Q. You swear as a fact that all the firm of Caro & Hooker is worth is $8,000?

A. I didn't say that. I said as far as I can judge, it is, to the best of my knowledge.

Mr. BARNES.—I understand that the correct estimate of values of property is that which a creditor would take the property at in payment of a debt from a solvent debtor.

Mr. HELLENTHAL.—How much do you want to prove he is worth? I will admit any amount.

Mr. BARNES.—Q. Will you stand by an admission that your attorney will make as to your worth?

The COURT.—Don't ask him that. Go on with your examination.

(Testimony of George C. Burford.)

Mr. BARNES.—Q. Then you say that the whole property values of the firm of Caro & Hooker will not exceed $8,000?

The COURT.—He has told you two or three times that if at an ordinary sale where he was not forced to sell, he could realize on his assets, they would have about $8,000 to the good. That is as I understand it.

[Testimony of George C. Burford, for the Plaintiff.]

GEORGE C. BURFORD, called as a witness for the plaintiff, being first duly sworn, on oath, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Mr. Burford, how is your financial condition at the present time?

A. Flat broke.

Mr. HELLENTHAL.—I want to object to all this line of testimony and take an exception to it, on the ground that it is incompetent, irrelevant and immaterial.

Objection overruled. Defendants except.

Mr. BARNES.—Q. How much property have you? A. I have none, Mr. Barnes.

Q. Are you insolvent too? A. I am.

Cross-examination.

Mr. HELLENTHAL.—Q. You went broke in the fish business, didn't you, with Martin?

A. Yes, sir.

Q. One reason you are broke is because Martin never paid you for your work, is that it?

(Testimony of Charles E. Hooker.)

Objected to by counsel for plaintiff as improper cross-examination. Objection sustained.

[Testimony of Charles E. Hooker, for the Plaintiff.]

CHARLES E. HOOKER, called as a witness for the plaintiff, being first duly sworn, on oath, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Mr. Hooker, what is your individual worth? A. Nothing.

Q. Are you insolvent? A. Yes, sir.

(No cross-examination.)

Plaintiff rests.

Mr. HELLENTHAL.—I want to make a motion, your Honor.

The COURT.—We will excuse the jury.

(Jury retire.)

[Motion for Nonsuit.]

Mr. HELLENTHAL.—Now, come the defendants and each of them, and move the Court that the plaintiff be nonsuited, on the following grounds and for the following reasons, to wit, first, because there is no evidence proving or tending to prove in any wise that any false, fraudulent or deceitful statements that can be the basis of an action for deceit or an action for damages as here brought were made by the defendants, or either or any of them, to the plaintiff at any time; second, that if any statements or representations were made with reference to the title of the property at Farragut Bay, that such statements were mere conclusions of law, and were

not statements of fact, and therefore were not actionable; third, that the evidence conclusively shows that the plaintiff and defendants were on an equal footing; that the plaintiff made no investigation or inquiry whatsoever with reference to the title of the defendants or any of them to the property at Farragut Bay, including the store building and fishing site, the evidence showing that Farragut Bay is within the Juneau Recording District, and that the records of property at that point are kept at Juneau, and that the plaintiff made no inquiry, or sought to make no inquiry from the records; and further, that he made no inquiry and sought to make no inquiry from persons other than the defendants, there being no evidence to show that such inquiry could not have been made; and further, that he never went to Farragut Bay to either examine the property or inquire about the title at that point; and for the further reason that there is no evidence before the Court proving or tending to prove that any statements of whatsoever nature, whether actionable or otherwise, made by the defendants, or any of them, were false.

Whereupon, after argument on the motion, Court adjourned.

February 25, 1908, 10 o'clock A. M.

The COURT.—Gentlemen of the Jury, the argument in the motion of Friday afternoon has not been completed, and the Court will ask you to retire from the courtroom for a few moments, remembering the admonitions heretofore given you.

(Jury retire.)

(After argument.)

[Order Overruling Motion for Nonsuit.]

The COURT.—I think I shall deny the motion for nonsuit. The location of the property and the testimony as to the representations made to the plaintiff, the positive statement of ownership in the defendants and the other representations by way of inducement which appear in the testimony are such, in my opinion, as to be sufficient for the establishment of a prima facie case. The purchaser was not bound to go to the property for the purpose of inspection. It is a long distance from here, an inconvenient place to reach, and should have been known by everyone to be on the public domain, and whatever possession they might have had, they had not a patent. It would be a mere possessory right, and if that were the case, there would be no record of the possessory right. Then, as I have already said, the positive assertion of ownership in the property, the description of the building and the other inducements which went with it, together with the location of the property, were such, even though the two parties were dealing at arm's-length, as to make it unnecessary for the plaintiff to investigate further. And the evidence here that is already in that they had not the title to the property and that they knew they had not the title to the property would go also to make the representations such as to relieve the plaintiff from any obligation to investigate further The defendant may have an exception.

Whereupon, the jury were recalled.

[Testimony of George C. Burford, Recalled for the Defendants.]

GEORGE C. BURFORD, being recalled as a witness in behalf of the defendants, testified as follows:

Direct Examination.

Mr. HELLENTHAL.—Q. Your name is George Burford? A. George C. Burford; yes, sir.

Q. You are one of the defendants in this case?

A. I am.

Q. Do you know Mr. Martin, the plaintiff?

A. Yes, sir.

Q. And you know the other defendants?

A. Yes, sir.

Q. You are familiar with all the property that has been referred to in this case at Farragut Bay and also the fishing property referred to?

A. Yes, sir.

Q. How long have you known the plaintiff?

A. Since August, 1905, I think, something about that time.

Q. Where did you meet him first?

A. I met the plaintiff in J. B. Caro & Company's office.

Q. At that time, in August, 1905?

A. Yes, sir.

Q. What, if any, dealings did you have with the plaintiff at that time?

Mr. BARNES.—We object to his stating his dealings with the plaintiff at that time. It comes under the allegations in his answer of which we made a

(Testimony of George C. Burford.)

motion and to which it was held by this Court that those dealings must be told to us whether they were in writing or by parol, and they didn't do it, so he is precluded from testifying, if the Court please.

Objection overruled. Plaintiff excepts.

Mr. BARNES.—Now, I make another objection. All their talk, all their words, all their actions were embodied in the bill of sale, and in writing under seal made at that time, and no long explanation of parol testimony can be introduced to vary the terms of that writing. The terms of the writing speak for themselves. They cannot now come in and by parol evidence endeavor to explain them away by anything that may have transpired before that writing was made.

The COURT.—I think that any testimony that discloses anything that affects the minds of the parties in entering into the agreement, is admissible.

Mr. BARNES.—I make the further objection that, as our action is against Caro & Hooker and this man and we based our contract upon a statement made by all of them, that no testimony can be introduced, under their answer, unless it is the language spoken by one in the presence of all, in which all assented.

The COURT.—I think on cross-examination it would be proper for you to show that representations which this man might have made to the plaintiff or statements which he might have made to the plaintiff were representations on his own part and not for all of the defendants; but I think that what-

(Testimony of George C. Burford.)

ever representations were made of any character are competent for the purpose of showing what was in the mind of the plaintiff when he entered into that agreement.

Plaintiff excepts.

A. At that time, we took up the matter of fishing. He stated that he was thinking seriously of going into the fishing business. I said I was thinking of the same thing. We were talking of the fishing business, and I explained to him the proposition that I had—

Mr. BARNES.—If the Court please, I ask that this witness be asked the questions. I object to a general statement being made by him because I want to object to the questions as they are asked. I object to the question as too general.

The COURT.—I think the question is too general.

Mr. HELLENTHAL.—Q. What if any conversation did you have with Mr. Martin at that time, at Hooker & Caro's office, when you and Mr. Hooker were present, with relation to this fishing business?

Mr. BARNES.—We object to that. He segregates out Mr. Hooker and does not have the others present.

Mr. HELLENTHAL.—Q. Where was Mr. Caro, if you know at that time?

A. In San Francisco.

Mr. BARNES.—We object. That is not the time that he signed the agreement. It is another time and another transaction. We say it is not competent evidence. We move to strike all the testimony

(Testimony of George C. Burford.)

that he has already given, because it was at another time than the time when the agreement was signed. We say that the testimony is not competent evidence, it is not material and it is not germane to the issues before this court. We ask that it be excluded, except that referring to the time when Mr. Caro was present.

(After argument.)

The COURT.—I think any testimony which brings to the plaintiff knowledge of the situation is admissible, no matter from whom it came. That is the gist of the whole action, lack of knowledge on the part of the plaintiff and the deceitful and fraudulent representation to him by another.

Mr. BARNES.—Do you hold that testimony can be introduced when Mr. Caro is not here, testimony when only two of them were here? We sue them in an individual capacity and as a partnership.

The COURT.—I think so. I will overrule the objection.

Plaintiff excepts.

Mr. BARNES.—We make the further objection that it is incompetent evidence because it assumes the fact that there was a fish business when there was no testimony that there was a fishing business. The only testimony was that it was a contract for the sale and purchase of land, and he assumes a fact to exist which is not in the evidence.

The COURT.—I will sustain the objection on the ground that it states testimony with relation to a

(Testimony of George C. Burford.)

fishing business. Ask him concerning the property sold.

Mr. HELLENTHAL.—Q. What, if any, conversation did you have with the plaintiff Martin at Caro & Co.'s office at that time, in August, of 1905, you and Mr. Hooker being present, with the plaintiff, in relation to this property sold to the plaintiff afterwards?

Mr. BARNES.—We object unless he confines it to this lot and building at Farragut Bay. That is the property in dispute.

Objection overruled. Plaintiff excepts.

Question read by stenographer.

A. With the plaintiff.

The COURT.—Q. No, what you said.

A. Well, we stated this, that I held an option on the Farragut Bay property.

Mr. HELLENTHAL.—Q. State the whole conversation as near as you can remember it, in reference to this whole transaction.

Mr. BARNES.—We object to that, because it is incompetent unless it appears that Mr. Caro was also present.

Objection overruled. Plaintiff excepts.

A. Well, I met Mr. Martin there and we got to talking about the fishing business which I was interested in.

Mr. BARNES.—We move to strike out anything about the fishing business. The Court particularly directed him not to answer that.

(Testimony of George C. Burford.)

The COURT.—Well, if that is part of the conversation, that is competent. I was ruling on the question that was asked as directing attention to the fishing business. This is part of the conversation that occurred relative to the sale of the property.

Mr. BARNES.—I would like to have it confined to the time of the conversation between himself and Hooker and Caro. That is the time that we complain of.

Objection overruled. Plaintiff excepts.

A. And he stated to me that he had been figuring seriously on going into the the fishing business; he thought it was a good proposition. I told Mr. Martin my proposition to take my outfit composed of the scow "Skagitt," the scow "Volunteer" and fishing tackle, etc., and we would go into Farragut Bay and catch the Seattle fleet which comes from Seattle—

Mr. BARNES.—We object to that, because he set up in seriatim in his answer what he did do, and that does not appear in his answer at all. And I do not think it is a fair way to let him go the way he is going and we not have a chance to object to it until after it is stated, because if I make a legal objection your Honor is going to sustain me, but it goes to the jury. He is a willing witness. He knows what he is doing. He is on to his job, and as I say we ought to have a chance to object to each of these questions as they come out, but we cannot do it in this way.

The COURT.—I know of no better way to examine a witness than to tell him to state a conversation.

(Testimony of George C. Burford.)

Mr. BARNES.—Now he is stating a good many conversations.

The COURT.—No, he is stating one conversation. I overrule the objection.

Plaintiff excepts.

Mr. HELLENTHAL.—Q. Proceed, Mr. Burford.

A. That we could go into Farragut Bay and catch the Seattle fleet and the Flattery fleet. Our intentions were—

Mr. BARNES.—We move to strike out the intentions.

Motion granted.

A. We would charge the fishermen fifty cents a box for wharfage for shipping their fish—

Mr. HELLENTHAL.—Q. Tell just the conversation that was had at that time, with reference to the sale of this property.

The COURT.—Q. What you said to him and what he said to you. State in the language used by each of you as near as you can.

A. He stated then that he was interested in this fishing business.

Mr. HELLENTHAL.—What I want you to do is to tell what you said and what Martin said on that occasion. Say what was stated at that time and what was talked about, not what your proposition was and what was agreed to be done, but what you said on that particular occasion.

A. We talked about opening in Farragut Bay a fishing station. That was about the fishing business.

(Testimony of George C. Burford.)

Mr. BARNES.—I move to strike out that last answer.

The COURT.—It may be stricken.

Mr. HELLENTHAL.—Q. Commence in Hooker & Caro's office on that occasion and state what the conversation was at that particular time with reference to that transaction. Now go at it. Commence at the beginning and tell what you talked about, how you met and what occurred.

A. I met Mr. Martin in Caro & Co.'s office there, and Mr. Hooker was there, and we got to talking about the fishing business. Mr. Martin told me he had been figuring on going into the fishing business, thought it was a good thing. I told him I was already in the fishing business, and I thought it was a very good proposition.

The COURT.—Q. You said that you thought it was a very good proposition? A. Yes, sir.

Mr. HELLENTHAL.—Q. What did he say and what did you say?

A. He asked me regarding my outfit, how I intended to work and I explained to him regarding the outfit I had.

The COURT.—Q. What did you say?

A. I said we would take the scow "Skagitt"—

Mr. BARNES.—I move to strike it out, because it is not in accordance with the Court's direction.

The COURT.—It may be stricken.

Q. What did you say to Mr. Martin when he asked you about your outfit?

(Testimony of George C. Burford.)

A. I told him that I owned the scow "Skagitt," the scow "Volunteer," seines, etc. I told him what the fishing business was composed of, the outfit.

Q. What did you tell him?

A. The scows "Skagitt" and "Volunteer," fishing seines, and everything pertaining to a fishing outfit.

Mr. HELLENTHAL.—Q. Did you tell him anything about the Farragut Bay property?

A. I told Mr. Martin that I had an option at Farragut Bay on a site consisting of a store—a shed building, and a cabin, and that I would sell this option or one that I thought was better, if we did not take up this option.

Mr. BARNES.—Now, I move to strike all this testimony because it is not germane to the issue. He now says, "We did not take up the option."

The COURT.—I will deny the motion.

Plaintiff excepts.

The COURT.—Q. State what you said and what Mr. Martin said, what was talked about between you, and tell it all, not generally what was talked about. What we want to know is, what was the information you conveyed to Mr. Martin, not a general statement that you talked about this and that or the other thing, but what did you say?

A. He asked me about the Farragut Bay site. I told him there was a site there consisting of a store shed, and a cabin, and this site went with the business; that it was an option, and if this site didn't suit us, we would go farther up, which I thought was

(Testimony of George C. Burford.)

a better place. We would get these fishermen to come into Farragut Bay and ship over our scow, and we would have a few supplies to keep the fishermen, and by having a little store on the scow or on the beach there, we would control these fishermen coming in from Seattle and Flattery and charge them fifty cents a box for all the fish shipped over our scow.

Mr. BARNES.—We move to strike that. It is not alleged in the answer.

The COURT.—If it is a part of the conversation, I think it is admissible. I do not think it is very material.

Mr. HELLENTHAL.—Q. Go ahead and tell what you said.

A. And he asked me then about the fish going below, about shipping fish, and the number of fish that were shipped during the winter over these scows. I told him he could get that at the Customs office in Ketchikan.

Mr. BARNES.—We move to strike that out. It is evident that that was not the language that the plaintiff used. Why don't he state the language?

The COURT.—If you can state the conversation in the language used by Mr. Martin and you, you must do so, Mr. Burford.

A. That is just about as near as you can get it.

The COURT.—Very well. Proceed.

A. I told him he could get the information at the Customs Office at Ketchikan. I told him about how many boxes were shipped that year, that there was

(Testimony of George C. Burford.)

anywhere from five to ten thousand boxes of fish shipped out of Alaska, and the year preceding that I didn't know how many. I told him I knew of the "Jefferson" and "Humboldt" taking four and five hundred boxes at a time out of there and charging them fifty cents a box for wharfage, which I thought was a good thing. And he asked me about the fresh fish business. I told him that there was good money in the fresh fish business if everything ran right, which there is. I told him the scow "Skagitt" was on the beach and we would walk down there. We walked down to the beach.

The COURT.—Q. Who was with you?

A. Mr. Martin and I.

Mr. BARNES.—We object to that as not material to the issues. It does not refer to a time when all were present.

Objection overruled. Plaintiff excepts.

A. We walked down to the scow "Skagitt." He examined it closely. He asked about the condition of the scow and I said he could look it over. I told him the scow was in fairly good condition; all we had to do was to caulk it up a little bit; and after looking over the scow, we came on back to town, and we went to my house up on Franklin or Gold Street.

The COURT.—Well, where?

A. The Williams house.

Q. Where is the Williams house?

A. Well, it is Judge Williams' house on Franklin or Gold Street. We went in and sat down and I

(Testimony of George C. Burford.)

showed him some returns, etc., statements from the stock-book of the Arctic Fishing & Packing Company, showing the business we had been doing and the good returns we had got.

Mr. BARNES.—I move to strike the good returns.

The COURT.—It may be stricken.

A. Well, I showed him the returns. We continued in the conversation. I don't remember just exactly what took place there, but he went away very favorably impressed.

Mr. BARNES.—I move to strike that.

Motion granted.

Mr. HELLENTHAL.—Q. Tell what you said and what Martin said and what was talked about between you, the conversation had between you, not whether he was favorably or otherwise impressed, whether he liked it or didn't like it, unless he said he liked it or didn't like it. Tell the jury just exactly what he said and what you said.

A. Well, Mr. Martin went on down town and that night he came up and he told me—

The COURT.—Where?

A. He came up to my house on Gold Street. He called me out and he asked me how long it would take to get that scow out. He said "You go ahead and get this scow out and get it in good condition and get it out as quick as you can." So I met him down town—it was on Sunday night—and we went up to Mrs. Francis' house on Gold Street, and the papers were signed up there. I went and got

(Testimony of George C. Burford.)

Charlie Hooker and brought him over and the paper was signed.

Q. What paper was signed?

A. This bill of sale. When we signed that, I told Mr. Martin there that I would get this scow in readiness and get to Farragut Bay just as quick as I could get there. Mr. Martin says, "It is all right," and he left the next morning for Haines.

Mr. HELLENTHAL.—Q. Now, Mr. Burford, what if any conversation occurred between you at any time and in any place, and state what it was and who was present, with reference to the sale of this property? Did you make an offer to sell it to him?

A. I did.

Q. Tell about it.

A. I met him in Caro & Company's office.

The COURT.—What was it?

A. I offered him one-third interest.

Q. What did you say to him?

A. I asked him how he would like to go into this business. I told him that it was a good thing, that I had good floating stock, and that he could have a third interest for two thousand dollars, was the price I made him. He asked me about Farragut Bay, and I explained to Mr. Martin there that this Farragut Bay was only an option.

The COURT.—Strike that out.

A. I told him that; I told him that Farragut Bay was an option. I told him I had not decided yet whether I would take up that option or the place

(Testimony of George C. Burford.)

farther up the Bay. It would depend, when we got there, as to which was the best location.

Mr. HELLENTHAL.—Q. What did he do? Did he take up your proposition, buy it?

A. He did. Mr. Martin said he would take it.

The COURT.—Q. Was that exactly what he said?

A. That is as near as I can remember. That is just about what he said.

Mr. HELLENTHAL.—Q. What, if anything, was done with reference to preparing the inventory of this stuff?

Mr. BARNES.—To which we object. That is not plead.

The COURT.—If the inventory were made out before they entered into the contract. I think that might be a material part of the transaction. If it were made out afterwards, I do not think it would.

Whereupon, Court adjourned, until 2 o'clock P. M.

February 25, 1908, 3 o'clock P. M.

GEORGE C. BURFORD, being recalled on direct examination, testified as follows:

Mr. HELLENTHAL.—Q. Mr. Burford, you testified this morning about negotiations you had with Mr. Martin looking toward the sale of this property that we have been discussing here. How long a time did these negotiations cover from the time you commenced until the time that the negotiations finally terminated and the signing of this bill of sale?

A. Two or three days.

(Testimony of George C. Burford.)

Q. Now, have you detailed all the conversations you had with Mr. Martin during those two or three days? Have you told us about all the conversations you had with Mr. Martin during the entire time, or did you have other conversations that you have not testified about?

A. I could not remember all the conversations we had. I just gave you the details of it. I could not remember everything we spoke about. I just gave you the best I could remember of it.

Q. Mr. Burford, can you detail now to the jury to the best of your recollection all the representations you made to Mr. Martin with reference to this property during the time of the pendency of the negotiations, in your own language?

The COURT.—Q. Yes or no. Can you or can you not? A. Yes, sir.

Mr. HELLENTHAL.—Q. Now you may do so.

Mr. BARNES.—We object, because the record that he made by signing the bill of sale and warranty deed is the best evidence of their intentions and of the whole transaction, and it is incompetent now to offer any evidence to vary or change the terms of that instrument.

The COURT.—I think the only competent evidence is the statements that they made. It is for the jury to determine, not from the testimony of what this witness said alone, but his statements to Mr. Martin and Mr. Martin's statements, back and forth. The only purpose this can have is to show the knowl-

(Testimony of George C. Burford.)

edge of Mr. Martin. Now, in order to get that properly before the jury, you must show what the conversations were and statements were as near as this witness can remember them. The witness must give as near as possible his recollection of the conversations which occurred; that is, as near as he can remember what he said to Mr. Martin and what Mr. Martin said to him.

Mr. HELLENTHAL.—Q. Do you know about how many conversations you had with Mr. Martin with reference to this matter, Mr. Burford?

A. No, I don't.

Q. Did you see him every day during these three or four days?

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. How many times did you see him during the three or four days?

A. I could not tell you how many times.

Q. I mean when this matter was up for discussion? A. I don't know.

Q. Was it frequent or infrequent?

A. Well, it was frequent.

Q. Now, in your discussions with reference to this matter what was the conversation had between you? I am not asking you to repeat just what was said at one place and just what was said at another place, but I am asking you to state what conversation passed between you and Mr. Martin that led up to this transaction?

A. We got to talking of the fish business—

(Testimony of George C. Burford.)

Mr. BARNES.—We object to it as repetition of what has been gone over this morning.

The COURT.—We want to know what he said and what you said.

A. I told Mr. Martin that I was in the fish business and gave to him an account of the business I had been conducting.

The COURT.—Q. What did you say?

A. I told him up to that time we had been shipping fresh fish and flushing; that is, salting fish, and he told me that he had figured very seriously on going into the fishing business, and I told Mr. Martin of my outfit, my scow "Skagitt"—

Objected to by counsel for plaintiff as repetition. Objection overruled.

A. My outfit consisted of the scows "Skagitt" and "Volunteer," seines, barrels, salt and everything pertaining to a fishing outfit, and with this, an option on a site at Farragut Bay, where we could open a little store and carry supplies for our fishermen.

Mr. HELLENTHAL.—Q. Now, that store, George, what was to be the purpose of that store?

The COURT.—Q. What was said about the store?

A. I told Mr. Martin that the site consisted of a shed building and a cabin; that the shed could be made into a store building and we could carry supplies for fishermen, and that I had an option on it for $225.00, if I remember rightly, and I was not decided whether I would take that option or not, or a

(Testimony of George C. Burford.)

place farther up, which I thought would be better, depending upon the large steamers which we could get to. I told Mr. Martin I had seen the steamship companies, and they had promised to come in there and take our fish. So, if they would come in and take out fish, we could then get the Seattle and Flattery fleets to come in and ship over our scow.

Mr. HELLENTHAL.—Q. Now, what did that have to do with the store business? Explain that, George, if anything.

A. That, in order to conduct our fish business properly, we had to have a few supplies the same as —I mentioned the man Lazier's name—the same as he kept for his fishermen; that we wanted them to get their supplies of us instead of going to Petersburg. I told him that every box of fish shipped over our scow meant fifty cents to us as a profit on the business. With our scow in there and the fishermen coming to us—

Mr. BARNES.—I ask that he be directed to say what he detailed to this plaintiff.

A. I detailed that to Mr. Martin, that with this scow in there to catch the shipments of the home schooners coming in and the shipments of the Flattery fleet, it would bring business to us.

Mr. HELLENTHAL.—Q. Now, George, had you seen the steamship companies?

A. I had seen them.

Objected to by counsel for plaintiff as immaterial. Objection sustained.

(Testimony of George C. Burford.)

Q. Now, Mr. Burford, how did you arrive at a valuation to place upon this property so as to arrive at the amount that Mr. Martin was to pay you, and what was done by you and Mr. Martin to arrive at such valuation? What was said with reference to that matter?

Mr. BARNES.—To which we object, on the ground that it tends to prove no issue raised by the pleadings, for the fact is that no valuation has been plead by either party, and no value is in issue here. We purposely plead no value because it had no value. Now, if they wished to raise an issue of value before this jury, they should have alleged that the property was of a certain value. I refer your Honor to the pleadings, and the only value they have alleged is the value of the site, which, they put it, $250.00. It is not fair for them to come here now and testify as to value of these other things. They must stand by what they have come into court on. If it is not an issue, we don't have to meet it.

The COURT.—The only purpose for which you can go into the question of values at all would be to show whether Mr. Martin paid his money entirely for the store site, or whether he paid it for other articles; whether, as he says, the fishing supplies were all thrown in and a mere secondary matter that he did not care about, or whether they were all a part of the consideration.

Mr. BARNES.—They have not plead it. I should think they would have to testify somewhat according to their answer.

(Testimony of George C. Burford.)

The COURT.—It is not a question as to what the property is worth. The only question, as I understand it from the pleadings, is as to whether Mr. Martin paid all his money for that property or whether he paid part of it for that Farragut Bay property and part of it for the other items. I will sustain the objection to that question. It is too involved.

Mr. HELLENTHAL.—Q. What conversation, if any, passed between you and Mr. Martin looking towards the placing of a valuation on the property subsequently evidenced by this bill of sale?

Mr. BARNES.—To which we object unless it specifies what it was that appeared in Mr. Martin's mind. This witness might have had a value on it, but the question is what valuation did Mr. Martin have, and confine it to Mr. Martin; and the further ground that it is not an issue raised by the pleadings.

The COURT.—Any testimony which goes to indicate to the jury whether or not Mr. Martin paid this money entirely for the store site at Farragut Bay, or partly for that and partly for some other purpose, will be admissible, but not on a question of value. I sustain the objection to that question, as to the question of value. Anything which goes to show and contradict the statements of Martin that his entire payment was for this store property and that the rest of it was all thrown in is admissible.

Mr. HELLENTHAL.—Q. What conversations or dealings were had between you and Mr. Martin touching the question as to whether he paid all the

(Testimony of George C. Burford.)

money for the store property or part for the other property?

Mr. BARNES.—We object to that. "What dealings," that is a conclusion of law.

The COURT.—Q. State any conversation with relation to the price paid by Mr. Martin and what it was paid for, for the buildings or for the outfit.

Objected to by counsel for plaintiff as not tending to prove any issue raised by the pleadings. Objection overruled. Plaintiff excepts.

A. I told Mr. Martin the price I wanted for one-third interest in the Arctic Fishing & Packing Company, the company I was interested in.

Mr. BARNES.—We move to strike out the answer, because it does not seem to be the property described in the bill of sale belonging to Caro & Co. and Burford. The Arctic Fishing & Packing Co. did not sign the bill of sale.

The COURT.—I will allow you to show who the Arctic Fishing & Packing Company was. I overrule the objection.

Plaintiff excepts.

A. I told Mr. Martin I wanted $2,000 for one-third interest in the Arctic Fishing and Packing Company. He asked me what this company was composed of, what we had. I named to him the scows "Skagitt" and "Volunteer," the log-float, seines, and everything that went with the Arctic Fishing & Packing Company. Furthermore, I told him to come with me, and he came to the house with

(Testimony of George C. Burford.)

me and I showed him the stock-book, everything in black and white, and he took a copy of everything in that book of the stock of the Arctic Fishing and Packing Co. We took the book and went over the stock. The scow was valued at something like—

The COURT.—Q. No, what did you say?

Mr. HELLENTHAL.—If your Honor please, when these people made the transaction, they agreed upon the value for these various pieces of property, and when they agreed upon it, it is competent evidence.

The COURT.—Let him state what the conversation was in which they agreed, what was agreed between these men as to what this man should pay for each article. It is not a question of value, of actual value. It is what he paid for it. It may be and it may not be the value.

Plaintiff excepts.

The COURT.—Q. What did he say?

A. I offered him this one-third interest for $2,000, and Mr. Martin stated he would give me $2,000 for one-third interest in the Arctic Fishing & Packing Company.

Mr. HELLENTHAL.—Q. Was there any conversation or agreement between you and Mr. Martin at which you placed a valuation on these different items that went into this transaction?

Mr. BARNES.—To which we object. Let him state the conversation.

(Testimony of George C. Burford.)

The COURT.—I will allow him to state if there was such a conversation, and if he says there was, let him state it.

A. There was, yes, sir.

The COURT.—Now, what was it?

Mr. BARNES.—We object to it because it tends to prove no issue raised by the pleadings, no value being plead.

The COURT.—The question is as to the segregation of the price. It is not a question of value at all. It is merely for the jury to consider what Mr. Martin paid his money for. That is what you are in court for. I overrule the objection.

Mr. BARNES.—If they don't plead it, can they prove it without pleading it?

The COURT.—You go on the stand and testify that he paid all his money for this property, and they may deny it.

Q. What was the conversation?

Objected to by counsel for plaintiff on the ground that it tends to prove no issue raised by the pleadings. Objection overruled. Plaintiff excepts.

A. Mr. Martin asked me the valuation of the different things. I told him I held the scow "Skagitt" at $3,000 or $3,500. I told him that the scow "Skagitt" had cost between fifteen and twenty thousand dollars to build, and that she was a good scow; that the "Volunteer" was a yellow cedar scow, and I told him that the yellow cedar scow was worth $1,000 or $1,200. I have forgotten which one of the two. He

(Testimony of George C. Burford.)

asked me about the log-float, and I told him that the log-float went with the "Volunteer." I told him that was worth $100, and the salt and some of the other things, I have forgotten the exact value placed on them, but it figured up something like $6,000.

Mr. HELLENTHAL.—Q. How about the Farragut Bay property?

Mr. BARNES.—We object, if your Honor please. It is alleged in the pleadings that the Farragut Bay property was worth $250, and it is not denied.

Objection overruled.

A. He asked me about the Farragut Bay property. I told him it was valued at about $250.00. I told him I had an option on the property for $225.00, but I did not know whether we would stop at this particular site. We might move farther up. It would depend entirely upon the large steamers coming in, whether they could stop at this location or the other to the best advantage.

Objected to by counsel for plaintiff as tending to prove no issue raised by the pleadings.

Objection overruled.

A. I told Mr. Martin that if we didn't take this site, that at the other site we went to I would put up buildings as good, if not better, than the ones at the original site. Mr. Martin stated that was perfectly satisfactory.

Mr. HELLENTHAL.—Q. Now, Mr. Burford, what kind of a scow was the scow "Skagitt"?

(Testimony of George C. Burford.)

Mr. BARNES.—We object to that, on the ground that it is immaterial what it was. The only thing material is the conversation between the two parties. If they had wanted to prove what that scow "Skagitt" was, why didn't they plead it? They didn't do it. I say to show something else that is not in issue here is immaterial.

The COURT.—Now, what the condition of these things was, what the condition of the scow or log-float, or anything else was would not have anything to do with the representations made by this man to the plaintiff. I do not see as it would be material to the issues in this case as to whether the plaintiff had been deceived by his remarks. What the actual condition of that scow was has nothing to do with the condition of this plaintiff's mind unless you bring it home to him. All he knows is what this witness told him, or somebody else told him about it. I sustain the objection.

Mr. HELLENTHAL.—Q. Martin saw the "Skagitt," didn't he? A. Yes, sir.

Q. During the negotiations when this deal was pending? A. Yes, sir.

Q. Did he see the other property?

A. No, sir.

Q. Did you describe to him the log-float?

Objected to by counsel for plaintiff as immaterial.

The COURT.—Whatever he said to Mr. Martin is material.

A. Yes, sir, I did.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. How did you describe it to him?

A. I told Mr. Martin we had a log-float at Windham, sixty foot long; and had a cabin, a shed with a roof on it; and bins all through her for flushing fish, that is, for summer fishing.

Q. Is that all you told him about it?

A. No, I told him I had been using this alongside of the "Volunteer," using the two in the different bays to flush our fish in. I told him that the "Volunteer" was alongside of the log-float at Windham Bay, and I told him that the "Volunteer" had seines, salt, barrels, tierces and all such paraphernalia as that.

The COURT.—Q. What else did you tell him about it?

A. I told him that I intended to take this scow and float to Farragut Bay, and use them there for salting purposes. I told him the valuation of the scow and the way the scow was made.

Q. What was it? How did you tell him it was made?

A. It was made of yellow cedar; she was a registered scow; she was sixty foot long and a fifty-ton scow, lined inside with two-inch red cedar through and through; she was built with fish bins all through her, and had a cabin on the after part 14 by 18 feet, to live on.

Q. Is that all you told him?

A. I don't remember, it is so long ago.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. Did you tell about the barrels, salt and seines?

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. Did you have any conversation about the salmon-troughs?

Objected to by counsel for plaintiff as leading. Objection overruled. A. Yes, sir.

Q. What was it?

A. Nothing in particular, only that we had salmon-troughs there to wash salmon at the troughs.

Q. What else did you tell him?

A. I told him that we had big tierces. I also told him that on board this "Volunteer" we had 80 barrels for salmon; also I believe we had 14 tons of salt on board of the "Volunteer." I also told him we had our seines and our paraphernalia, grindstones, knives, salt, etc.

Mr. BARNES.—I object to that and move to strike it. It is not alleged in the pleadings.

Motion denied.

A. And that she had her anchors and lines.

The COURT.—Q. Whatever you said to him, let us have it.

A. Well, there was so much stuff on it I have forgotten all I did tell him. I told Mr. Martin everything that was on the scow, because I had the stock invoiced there, and he had it on his lap and was reading it over.

Mr. HELLENTHAL.—Q. What did you tell him? A. I can't remember all I told him.

(Testimony of George C. Burford.)

Q. What about that stock-book now?

Objected to by counsel for plaintiff as not tending to prove any issue raised by the pleadings.

The COURT.—Q. When was this purported invoice made up, before the transaction or afterwards?

A. It was before.

Mr. HELLENTHAL.—Q. How long before?

A. Oh, a day or two before.

The COURT.—Was that a list that he took from your stock-book?

A. No. He took a list from my stock-book, but I made a list from my stock-book.

Q. The same thing?

A. The same thing. I made it out in typewriting.

The COURT.—I will admit it.

Mr. HELLENTHAL.—Q. When did he get that typewritten list?

A. About the time, or before the transaction was made, before the bill of sale was signed.

Q. What was in that typewritten list? Have you a copy of it yet?

A. I have in Wrangell Narrows, not here.

Q. Have you tried to get it?

A. I have tried to get it.

Q. And you couldn't get it?

A. No, sir. I wrote for it. My furniture I tried to get at the same time. My friend that I wrote to said that they had instructions to turn over everything to Norburg & Twiten, to send nothing to Burford.

(Testimony of George C. Burford.)

Objected to by counsel for plaintiff as not tending to prove any issue raised by the pleadings, and not cross-examination.

Mr. BARNES.—May I ask a question?

Mr. HELLENTHAL.—I have no objection.

Mr. BARNES.—Q. Wasn't it simply because you ran a bill at Brown's and that is the only reason you could not get them?

A. No. If I had run a bill at Brown's store, he could not hold my wife's furniture.

Q. That was not the reason why you couldn't get your things away? A. No, sir, it was not.

Mr. HELLENTHAL.—Q. Mr. Burford, what did that invoice contain?

Objected to by counsel for plaintiff as not tending to prove any issue raised by the pleadings.

The COURT.—What do you offer it for?

Mr. HELLENTHAL.—It was pursuant to and upon that invoice that they arrived at the amount, at the value of the one-third interest.

The COURT.—I do not think you have shown sufficient diligence on the part of the witness' attempting to get the original.

Mr. HELLENTHAL.—Q. Mr. Burford, where have you resided since the time this suit was commenced? A. At Valdez.

Q. Where was this invoice, this original invoice?

A. The original invoice is down at my place at Wrangell Narrows, at Scow Bay.

(Testimony of George C. Burford.)

Q. What, if anything, have you done looking towards getting that original invoice since this suit was commenced?

A. I wrote to a friend of mine, Tom White—he was just about a quarter of a mile the other side of me—and asked him to go and get my papers, my life insurance, two policies were there. I also wrote Tom to get my wife's furniture and to ship them up. I asked him to hunt up my papers. They were in a tin cash-box, and to get this furniture and send it up to me, and he wrote back to me—

The COURT.—Never mind what he wrote back.

Mr. HELLENTHAL.—Q. Did you get them?

A. I didn't get them, no.

Q. In whose possession are the papers?

A. I don't know whose possession they are in.

Q. In whose possession were the papers at that time? What information upon that matter did you receive, as to who held possession of them?

A. He notified me that Norburg & Twiten—

Objected to by counsel for plaintiff as secondary evidence.

The COURT.—If they held possession of them, it is proper to show it.

A. He wrote me that Norburg & Twiten were holding them under instructions from Mr. Martin.

Mr. HELLENTHAL.—From Martin, the plaintiff? A. Yes, sir.

The COURT.—I do not think that shows that they were in the possession of the plaintiff. All it does, it shows that this witness has not got them.

(Testimony of George C. Burford.)

Q. When did you write this letter, Mr. Burford?

A. I wrote several letters.

Q. When was the first time that you wrote?

A. I don't remember when. I wrote from here and I also wrote from Valdez.

Q. How long ago?

A. The last letter was to another party, to Mr. Fields, *asking find them to see if he could get them and dispose of them, the furniture.*

Q. That was for the furniture?

A. For the furniture and my life insurance papers.

Q. When was that?

A. I don't remember when it was. The last time was probably about two or three months ago.

The COURT.—I do not think the man has shown sufficient diligence in attempting to procure the invoice to allow the secondary evidence. I will sustain the objection.

Mr. HELLENTHAL.—Q. Did you go down there yourself? A. No, sir.

Q. Why didn't you? A. I had no money.

Q. What, if any opportunities did you have to go down there since arriving at Juneau?

A. I could not leave. I was a witness on the Kildall case and my own case was set for the 15th, and again I didn't have money to get out of here. I had to borrow money to get here.

The COURT.—That paper was of as much interest to the other defendants as to him. I think I will sustain the objection as secondary evidence.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—This paper at Scow Bay is only a copy, the original is in possession of the plaintiff. I just happened to think of it.

Q. Who got the list that you took from your stock-book? A. Mr. Martin.

Q. You have heard Mr. Martin's testimony that he had no such list? A. I did, sir.

Q. What did that list contain?

Objected to by counsel for plaintiff as incompetent evidence.

Mr. BARNES.—They have not shown that we had the list. They say that we had the list and we say that we had not. May I ask a question?

The COURT.—Yes, sir.

Mr. BARNES.—Q. Didn't you write to Mr. Martin that that invoice was here in Juneau, in Caro & Company's safe?

A. There was a copy of it in Caro & Company's safe.

Q. Answer my question. Did you write to Mr. Martin that the invoice was here in Juneau, and in Caro & Company's safe?

A. I told Mr. Martin that there was a copy of it in Caro & Company's office or in the safe.

Q. They are the defendants here, aren't they?

A. Yes, sir.

Q. The whole business were copies, weren't they?

A. This that Caro & Co. had was a copy.

Q. That was sent to Mr. Martin after he went to Haines, wasn't it? A. No, sir.

Stenographer reads question last objected to. Objection sustained.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. What was the valuation placed upon the Farragut Bay property in that list?

Mr. BARNES.—To which we object, if your Honor please. They are bound by the pleadings and cannot disprove it.

The COURT.—The only purpose for which he can prove the valuation is to show at what price it was put in in this deal.

Q. How came you to make that invoice?

A. Mr. Martin asked for it.

Q. From what was it taken?

A. From my stock book.

Q. Did you carry the site in your stock book?

A. No, there is no site there, just the stock of the Arctic Fishing & Packing Co.

Q. There was not anything in your stock book of the site, of the Farragut Bay site?

A. No, sir. That was the stock book of the Arctic Fishing & Packing Company.

Objection sustained.

Mr. HELLENTHAL.—Q. What was this inventory, Mr. Burford? Explain that to the Court and jury.

Mr. BARNES.—We object to his proving the contents of it. The inventory itself is the best evidence.

Mr. HELLENTHAL.—Q. What was it? Don't tell what the contents of it are.

Objected to by counsel for plaintiff, on the ground that the inventory itself is the best evidence.

(Testimony of George C. Burford.)

The COURT.—Have the other defendants a copy of it?

Mr. HELLENTHAL.—Q. You have asked them, haven't you?

A. Yes. They said they could not find any copy. My copies are in Wrangell Narrows.

The COURT.—Find out where it all came from. If these lists were made from an original invoice book or something else, you had better show that.

Mr. HELLENTHAL.—Q. Where is that invoice book? A. In Wrangell Narrows.

Q. With your other papers? A. Yes, sir.

The COURT.—Q. Was that one that was in Caro & Company's safe?

A. No. That was on a copy book. It was a book that belonged to Mrs. Francis, and I looked for the book the other day and I could not find it. It must be in Wrangell Narrows.

Mr. HELLENTHAL.—Q. What was this inventory?

Mr. BARNES.—To which we object, as it assumes the fact that there was an inventory, when there was not an inventory.

The COURT.—How is it material?

Mr. HELLENTHAL.—It is material in this way. It is a list that these parties agreed upon as the valuation of the different articles of property.

The COURT.—If these men agreed upon the prices at which they were to go in, all right, but the fact that this man makes out an inventory is not material.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. Tell the Court about that.

Mr. BARNES.—It is in evidence by the plaintiff in this case that he had no invoice, that it was lost.

The COURT.—How does that make any difference whether he received an invoice or not, if it was not an invoice containing the prices agreed upon between the parties? I will allow you to show that the prices in this inventory were agreed upon by the parties. Then when you have shown that these prices were agreed upon, that inventory becomes material. You are trying to show what the inventory contains before you show whether it is material or not. Show first what the agreement was and not what the result was.

Mr. HELLENTHAL.—Q. Did you and Mr. Martin have any agreement between you prior to the execution of this bill of sale touching the valuation that you placed, as between the two of you, by agreement, upon the various articles mentioned in this bill of sale?

Objected to by counsel for plaintiff as leading.

The COURT.—Q. Did you, or did you not?

A. We did.

Mr. HELLENTHAL.—Q. How was the agreement evidenced? Was there any writing connected with it?

A. Any writing connected with it?

Q. Did you write down the various values?

A. Yes, sir.

Mr. BARNES.—To which we object as leading. We move to strike the answer.

(Testimony of George C. Burford.)

The COURT.—I will allow it to stand.

Mr. HELLENTHAL.—Q. How did you write that down, and under what circumstances?

A. We made a list of everything in the stock-book that belonged to the Arctic Fishing & Packing Company and carried out the prices of it.

The COURT.—Q. Who?

A. Mr. Martin and myself.

Q. When was that?

A. This was at my house a couple of days before the transaction was closed.

Mr. HELLENTHAL.—Q. Did that list contain all the various articles enumerated in this bill of sale, including the Farragut Bay property?

Objected to by counsel for plaintiff on the ground that the invoice is the best evidence.

The COURT.—The trouble with the situation is this, that he is not the only defendant in the case, and the mere fact that this man was unfortunate enough not to have money to take himself to Petersburg does not preclude the other defendants from furnishing him money for something that is material in the case.

Mr. HELLENTHAL.—Q. What interest have Caro & Co. in this lawsuit anyway?

Objected to by counsel for plaintiff on the ground that the record is the best evidence.

The COURT.—I think that objection is well taken. I do not think you have shown sufficient diligence on the part of the defendants to attempt to procure this paper if it is immaterial.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—I cannot show any greater diligence, your Honor.

The COURT.—I do not think you can show by this witness the contents of the inventory. I do not think you have shown sufficient diligence.

Mr. HELLENTHAL.—In order to get the record straight, I will ask the question.

Q. Mr. Burford, what were the contents of the inventory that you have testified to as having had a copy of and having lost?

The COURT.—He does not say that he has lost it.

Mr. HELLENTHAL.—Q. Did you make any efforts here in town to get a copy of that inventory?

A. I did.

Q. What efforts did you make?

A. I went through all the copy books I could find in Caro & Co.'s office to see if I could find that book. I went through all the papers Mrs. Francis had at her place. We searched a day and a half to find it, and we were not able to find it.

Q. The copy of the invoice was in a copy book?

A. Yes, sir.

Q. You could not find it in town?

A. No, sir.

Q. From that, did you conclude that it was in Petersburg? A. Yes, sir.

The COURT.—Q. You don't know whether it is in Petersburg or not? A. No, sir.

Mr. HELLENTHAL.—Q. What were the contents of that copy which you say was in the letter book, that copy of this invoice that you gave to Mr.

(Testimony of George C. Burford.)

Martin which contained an enumeration of these various articles, together with the valuation placed thereon by yourself and Mr. Martin in connection with this venture?

Mr. BARNES.—To which we object, on the ground that it is incompetent, being secondary evidence, and not sufficient diligence shown by them of trying to produce the invoice.

Objection sustained. Defendants except.

Mr. HELLENTHAL.—Q. Now, Mr. Burford, at what sum did you and Mr. Martin in your negotiations place the Farragut Bay property?

Mr. BARNES.—To which we object, as attempting to prove the contents of that invoice, no diligence being shown of their trying to produce the invoice; and if he can prove one item, he can prove another, and if he can prove another he can prove all of them.

The COURT.—Q. Did you come to any agreement with Mr. Martin or have any conversation with him as to the price of that property that was to be put on the different items of it? A. Yes, sir.

Q. Give the conversation.

A. I told Mr. Martin that the value of the Farragut Bay property was $250.00.

Q. Did he agree to that? A. He did.

Q. What did he say?

A. He said that was all right.

Mr. HELLENTHAL.—Q. Now, what conversation did you have, if any, with Mr. Martin with

(Testimony of George C. Burford.)

reference to going into the mercantile business down there?

Mr. BARNES.—We object to that as immaterial. Their only allegation is that they went into the fishing business.

The COURT.—Do you mean as to the value of the business?

Mr. HELLENTHAL.—No. As to the character of the business.

The COURT.—That is, not as to any statements that this man made, but the conversation between them?

Mr. HELLENTHAL.—Yes, sir.

The COURT.—That might bear on the question as to what he paid his $2,000 for. I overrule the objection.

Plaintiff excepts.

Q. What did Martin say to you as to what business he wanted to go into, if anything?

A. He told me he wanted to go into the fishing business.

Q. Did he ever say anything about the mercantile business?

A. We spoke about running a little store for supplies for our fishermen. Mr. Martin agreed that he was to have one-third of it and I was to take the rest, as I owned two-thirds of the business.

The COURT.—Q. Is that the conversation?

A. That is the conversation. Mr. Martin bought in one-third interest.

Mr. BARNES.—I would ask him when this was that he owned the other two-thirds.

(Testimony of George C. Burford.)

A. When I referred to myself at that time I meant myself and Hooker and Caro.

Q. That you and the other defendants owned two-thirds of the business at that time?

A. Yes.

Mr. BARNES.—I object to it as immaterial.

Objection overruled. Plaintiff excepts.

Mr. HELLENTHAL.—Q. These negotiations that you have detailed led up to this bill of sale that is offered in evidence and marked Plaintiff's Exhibit No. 1? A. Yes, sir.

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. Were these the negotiations that led up to the execution of this bill of sale, these negotiations that you have testified about?

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. What did these negotiations lead up to in the way of the execution of the bill of sale, Mr. Burford?

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. Mr. Burford, what did these negotiations lead up to?

A. These negotiations with Martin?

Q. Yes.

A. In buying one-third interest in the Arctic Fishing & Packing Company.

Q. Was there any written evidence of that sale?

A. The bill of sale.

(Testimony of George C. Burford.)

Q. The bill of sale you refer to is the one offered in evidence here and marked Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. Mr. Burford, on what day was that bill of sale executed?

Objected to by counsel for plaintiff on the ground that the bill of sale is the best evidence.

Mr. HELLENTHAL.—I am trying to get at what day of the week it was that it was executed.

Objected to by counsel for plaintiff on the ground that the bill of sale is the best evidence.

The COURT.—If some one will show what day it was by the calendar the Court will take judicial notice of it. What is it you are trying to prove?

Mr. HELLENTHAL.—These are only preliminary questions so far as that matter is concerned, but I say I have a right to prove whatever day it was executed on. I am just trying to prove that this instrument was signed on Sunday.

Mr. BARNES.—They cannot take advantage of their own wrong, if it was Sunday.

Objection overruled.

A. The papers were drawn up Sunday night.

Mr. BARNES.—Drawn up and executed are two different things, if your Honor please.

WITNESS.—Drawn up and signed on Sunday night.

Q. Who prepared them?

A. There was Charlie Hooker—

Q. Who prepared them? Who wrote them out?

A. Mrs. Francis.

(Testimony of George C. Burford.)

Q. From what did she prepare them?

A. From a copy.

Objected to by counsel for plaintiff on the ground that the record speaks for itself.

Mr. HELLENTHAL.—I want to prove that this paper is merely a stereotyped form of bill of sale that they picked out of a copy.

The COURT.—If they picked it out, that does not make any difference, whether it is stereotyped or not.

Mr. HELLENTHAL.—Q. Mr. Burford, how did you come to insert that statement in your bill of sale that the "said parties of the first part hereby covenant that they are the owners and entitled to sell the" articles mentioned?

Objected to by counsel for plaintiff on the ground that the bill of sale speaks for itself, and that they ought to have hired a lawyer. Objection sustained.

Q. Did you hire a lawyer? A. No, sir.

Q. This was a home-made bill of sale?

A. Yes, sir.

Q. After this sale was consummated, what did you do with relation to the fishing business?

A. After the sale was made?

Mr. HELLENTHAL.—These are preliminary questions that will lead up to the subsequent settlement, to show the situation that the parties were in.

Objected to by counsel for plaintiff as immaterial.

Mr. BARNES.—All this evidence that he now proposes to offer will not be material unless there was an innovation. Why should we get in a lot of evidence here now, and then after awhile when he seeks to prove an innovation, he cannot do it?

(Testimony of George C. Burford.)

The COURT.—Prove your agreement and then prove the facts that led up to it.

Mr. HELLENTHAL.—Q. Did you ever have any subsequent agreement with Mr. Martin, Mr. Burford?

Mr. BARNES.—We object to that. That does not prove an innovation.

Mr. HELLENTHAL.—Q. Did you, acting for the defendants in this case, have any subsequent agreement with Mr. Martin?

Mr. BARNES.—To which we object because it is the defendants combined.

The COURT.—I will overrule the objection. We will see if it appears that he was not acting for the other defendants.

Question read by stenographer.

A. Do you mean a final settlement?

The COURT.—He asks you if you had any further agreement?

A. I did, sir.

Mr. HELLENTHAL.—Q. Where was that?

A. At Wrangell Narrows, Scow Bay.

Q. What were the circumstances that led up to that other and further agreement?

Mr. BARNES.—May I ask a question?

The COURT.—Yes, sir.

Mr. BARNES.—Q. Wasn't that agreement finally evidenced by a writing between you?

A. Yes, sir.

Mr. BARNES.—Now we have a writing, and we ask that the writing be introduced instead of the

(Testimony of George C. Burford.)

oral or parol agreement that occurred before the writing.

Mr. HELLENTHAL.—Q. Mr. Burford, I hand you here a paper marked Defendants' Exhibit "E," for identification, and ask you to look at it and state what it is.

Mr. BARNES.—We object to his stating. We don't care if he looks at it.

Mr. HELLENTHAL.—Q. State what it contains.

The COURT.—Q. What is it, generally, not to detail its contents; whether or not that is the agreement to which you referred?

A. Yes, sir, it is.

Mr. HELLENTHAL.—Q. Is that your signature, Mr. Burford? A. Yes, sir.

Mr. HELLENTHAL.—We will offer that in evidence.

Mr. BARNES.—We object to it because it does not tend to prove any issue raised by the pleadings. The issue raised by the pleadings is that this settlement was in writing, and in that settlement he agreed that he "would not demand a one-third interest in and to the said Farragut Bay site, as hereinbefore referred to." It is immaterial, because the inventory was a copy from the stock-book, and in the stock-book, this witness who made the inventory says that the Farragut Bay property was not invoiced, was not in that book. Consequently, it can in no instance refer to the Farragut Bay property.

(Testimony of George C. Burford.)

The COURT.—I will admit it.

Plaintiff excepts. Defendants' Exhibit "E" received in evidence and read to the jury, as follows:

[Defendants Exhibit "E."]

Petersburg, Dec. 15, 1905.

I, the undersigned, this 15th day of Dec., 1905, cancel a note of $500.00, Five Hundred Dollars, made in favor of Arctic Fish and Packing Co. and signed J. W. Martin, Dated August 28, 1905, to run 4 months. This is in accordance with understanding the aforesaid parties had, as certain articles were missing from original invoice. The cancellation of this note is to make right these said missing articles.

Signed ARCTIC FISH AND PACKING CO. [Seal]

Signed GEORGE C. BURFORD.

Mr. HELLENTHAL.—Q. What was the agreement now that you had with Mr. Martin that led up to the giving of this receipt that is in evidence?

The COURT.—Q. What was the conversation?

Mr. HELLENTHAL.—Q. What were the conversations had between you and Mr. Martin that led up to the execution of this receipt?

Mr. BARNES.—We object to that, because it is not competent evidence now to vary by parol that written receipt which was, as he testifies, the culmination of all their talk, that shows what their talk was, and any parol evidence may not be admitted to change the terms of it, if your Honor please.

Objection overruled. Plaintiff excepts.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. Commence from the beginning of all the conversations that were had upon this question and say where they were and all the circumstances. State fully the whole business.

A. This was after we had moved into Wrangell Narrows from Farragut Bay, the Arctic Fishing & Packing Co., our outfit. Mr. Martin was not with us at that time.

Mr. BARNES.—We object to it, if Mr. Martin was not there.

The COURT.—What he means is that Mr. Martin was not with them when they moved.

A. After we were in Wrangell Narrows, Mr. Martin came down and asked me why we didn't stop at Farragut. He told me that Farragut Bay would be a better fishing site. I told him we had to get out of there on account of the steamers not coming in and on account of the storms.

Mr. HELLENTHAL.—Q. You had had information that the steamers would not come in?

Objected to by counsel for plaintiff as incompetent evidence. Objection overruled.

A. Mr. Martin and I at different times through the week, two or three weeks, spoke about Farragut Bay. He asked me why I didn't stay there.

The COURT.—Q. Was he there all this time?

A. No. This was after he got there.

Q. You said two or three weeks.

A. Yes, after he came down. I told him that we were forced out of there. I told him this, "If you

(Testimony of George C. Burford.)

want to go back there, we can go back there, but we can do much better here than we can there."

Mr. HELLENTHAL.—Q. Explain what you told him about being forced out of there, fully. Is that all you told him?

A. That we had received the word from Mr. Caro at that time that the Pacific Coast Steamship Co. had notified him that they would not call in at Farragut Bay for us, and there would be no use staying there with our outfit unless they would stop for us.

Objected to by counsel for plaintiff as not tending to prove any issue raised by the pleadings. Objection overruled. Plaintiff excepts.

A. Then this equinoctial storm came on.

Q. What else forced you out?

A. The steamers not coming in forced us out. Then we moved on to Wrangell Narrows.

The COURT.—Q. Who moved.

A. The company, the outfit. Mr. Martin didn't go there until some time later. Mr. Martin thought that I ought to make this Farragut Bay deal good.

The COURT.—Q. What did he say?

A. He told me—he says, "I don't think this is right. I think you ought to make this Farragut Bay deal good." I says, "If you wish, we will go back there." Then he changed his opinion on it.

Objected to by counsel for the plaintiff as a conclusion of the witness.

The COURT.—Q. What did he say?

(Testimony of George C. Burford.)

A. He said we would remain here where we were, and next year— Now this was a conversation between him and I.

Q. What was said?

A. That we would stay there this year and next year we would go back to Farragut Bay if the steamers would stop there. About that time I was subpoenaed on the grand jury to come to Juneau, and Mr. Martin remained there while I was here, and he says to me, "Now, when you come back I think you ought to cancel that note and we will call that Farragut Bay deal square." He says, "I don't think it is right to hold that note against me and not deliver the Farragut Bay property." Well, I thought over it.

The COURT.—Q. What was said?

A. He asked me to bring the note back when I came back, and I said I would think about it. I served on the grand jury and went back, and the first thing he asked me when I came back was if I had brought the note. I told him no, and then he asked me to cancel the note on account of that Farragut Bay deal. He says, "You cancel the note, and give me shares enough to make it half." He says, "I have got a proposition on hand that we will both get *out* money out of it, and not lose anything." That is what he told me. I had all my money invested there, so I wrote up this agreement.

Mr. BARNES.—I move to strike about his having all his money invested in it.

The COURT.—It may be stricken.

(Testimony of George C. Burford.)

A. I says I will cancel that $500.00 note and we will call the Farragut Bay deal off; we will make that square. You bought one-third interest of it for $250.00, and I will cancel the $500.00 note.

Mr. HELLENTHAL.—Q. Was there any talk there about any other articles that were lost?

A. No. Most everything was there, the scows and things, with the exception of the log-float. That was on the high ground so that the tide couldn't get it off.

Q. In that receipt, where it states about the articles that are missing from the invoice, what did that refer to?

Objected to by counsel for plaintiff, on the ground that the receipt is the best evidence of it, and it is incompetent. Objection overruled.

A. It referred solely to the Farragut bay site. We had a thorough understanding on it.

The COURT.—Strike that out about the understanding.

Mr. HELLENTHAL.—Q. So that was a settlement of all differences then existing between you and Mr. Martin, was it?

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. I might ask you if there were any other differences then existing between you and Mr. Martin after that settlement? A. No, sir.

Q. Did you ever present that note for payment?

A. No, sir.

(Testimony of George C. Burford.)

Q. What authority did you have from the other defendants to negotiate that transaction?

A. The note was made out to George C. Burford and J. B. Caro & Co., and I had the authority to cancel that note because I was managing the outfit. It was my business.

Q. You had full authority to do anything in connection with that fishing business?

Objected to by counsel for plaintiff as leading. Objection sustained.

Q. What was your authority in connection with the fishing business?

A. I owned it.

Mr. BARNES.—I move to strike the answer, because it is not responsive to the question, if the Court please.

Motion denied.

Plaintiff excepts.

Whereupon court adjourned until to-morrow morning at 10 o'clock.

February 26, 1908, 10 o'clock A. M.

GEORGE C. BURFORD, being recalled to the witness-stand, testified as follows:

Cross-examination.

Mr. BARNES.—Q. Who gave you that option?

A. Mr. Johnson.

Q. What Mr. Johnson?

A. At Farragut Bay.

Q. Is it in writing? A. It is in writing.

Q. Where is it? A. In Wrangell Narrows.

Q. Did you ever try to get it?

(Testimony of George C. Burford.)

A. Yes, sir, I wrote for it.

Q. Who to? A. To Mr. White.

Q. You have been through there a couple of times since this suit commenced, haven't you?

A. Yes, sir, once going and once coming.

Q. What is Mr. Johnson's name?

A. I don't remember his name now, his initials.

Q. How long did you have that option here?

A. I don't remember how long.

Q. When did you first get it?

A. I got the option in March.

Q. How long after you purchased the property did you get that option, this fishing outfit? How long after you purchased this fishing outfit did you get that option?

A. Well, I had the biggest part of the outfit probably a couple of years before I got the option.

Q. Who did you purchase it from?

A. From Chris Dorr.

Q. You didn't purchase from Earl Hunter then?

A. No, sir.

Q. This fishing outfit that you refer to. I want you to be as positive of that as anything else. You didn't purchase it from Earl Hunter?

A. Caro & Co. bought Earl Hunter out later on.

Q. Then you bought from two different persons, did you? A. Yes, sir.

Q. How long after you purchased it from Earl Hunter did you get this option?

A. I had it before we purchased from Earl Hunter.

(Testimony of George C. Burford.)

Q. Then Earl Hunter was not the sole, exclusive owner of this property at the time you purchased from him? A. No, sir.

Q. You and he were partners then awhile?

A. We were partners.

Q. And you then purchased his interest?

A. Caro & Co. purchased his interest.

Q. How long then had you been the owner of the property before Caro & Co. came in?

A. Probably a couple of years.

Q. A couple of years you and Mr. Hunter were partners then? A. I believe so.

Q. Now, Mr. Hunter didn't own anything of this option with you, did he?

A. I told Mr. Hunter about the option. He was interested with me in the option.

Q. He was interested with you in the option?

A. Yes, sir.

Q. You had the option here at the time you made this deal with the plaintiff, didn't you?

A. I believe I did, sir.

Q. Do you know, or do you not know?

A. Yes, sir, I had it.

Q. And you showed it to the plaintiff in this case, did you? A. No, sir.

Q. Now, what was Mr. Johnson's name?

A. I don't remember his initials.

Q. And you had the option in your possession some time? A. Yes, sir.

Q. You have no idea then who he was?

(Testimony of George C. Burford.)

A. I remember the man, but I don't remember his initials.

Q. You read the option? A. Yes, sir.

Q. And his name on it? A. Yes, sir.

Q. He lives at Farragut Bay? A. Yes, sir.

Q. He gave you an option which you carried two years before that deal?

A. That option was not carried two years before. I got that option in March.

Q. You owned the premises two years before?

A. No, sir, I owned the fishing business two years before.

Q. You and Earl Hunter were partners for two years? A. Yes, sir.

Q. How long was this option to run?

A. Let's see; it was to run—this option was to run something ten months.

Q. This answer was made out on the 18th day of April, 1907, wasn't it? A. I don't know.

Q. Well, that is the record. The date of it shows it to be that. Now, why didn't you, since the 18th day of April make some endeavor to get that option here? A. I tried to get my papers here.

Q. You didn't try though, as the Court says, with sufficient energy to testify as to what were the contents of them.

A. I did all in my power. I had no more time to do any more than I did.

Q. You have been down past there though, going and coming, since this suit was filed, since this answer was in? A. Yes, sir.

(Testimony of George C. Burford.)

Q. What is your business?

A. I am working for the Valdez Bank and Mercantile Co. I am a salesman.

Q. Have you an interest in the business?

A. No, sir.

Q. Do you get a commission on the sales?

A. No, sir.

Q. How much salary do you get?

A. $150.00 a month.

Q. With that salary, that $150.00 a month, you didn't have the means to make any more effort to bring the papers into this court, that you have been testifying about, except to write a letter?

A. I did not, sir.

Q. How long have you been working for that Valdez firm?

A. I believe I went out there in 1906, in July.

Q. You are a merchant; that is your business?

A. Yes, sir.

Q. You know of the importance of having papers to rely on for their existence, don't you?

A. Yes, sir.

Q. Now, what has become of that float, the "Volunteer"? A. The float?

Q. No, the scow, I guess?

A. The "Volunteer" was wrecked in the storms in January.

The COURT.—Q. What year? A. 1906.

Mr. BARNES.—Q. And she sunk of her own weight, didn't she? A. No, sir.

(Testimony of George C. Burford.)

Q. She wasn't there when Mr. Martin, the plaintiff in this case—well, she wasn't there when you signed that release to Mr. Martin?

A. Yes, sir. She was on the beach.

Q. She was wrecked on the beach, was she?

A. She was wrecked at Farragut Bay.

Q. That float, what has become of that?

A. It is still at Windham Bay.

Q. She never was shown to Mr. Martin at all; he didn't see it, did he?

A. He didn't see it, no, sir.

Q. After this sale was made, the float has never been seen by him at all? A. No, sir.

Q. You represented that you had some dories. Some of them were missing too, weren't they?

The COURT.—There are two questions there, Mr. Barnes.

Mr. BARNES.—Q. You represented to them that you had a certain amount of dories, didn't you, in that bill of sale? A. Seine-boats, yes, sir.

Q. Some of them were missing, weren't they?

The COURT.—When?

Mr. BARNES.—Q. At the time Mr. Martin came down there to Wrangell Narrows, the first time he saw those articles?

A. They were on the beach at Windham Bay.

Q. They were here first, weren't they?

A. No, sir.

Q. Then they weren't seen by Mr. Martin at all, were they? A. No, sir.

Q. So, as far as he was concerned, those boats and that float were missing, weren't they?

(Testimony of George C. Burford.)

A. Yes, sir.

Q. You located some land at Farragut Bay, didn't you? A. I staked some land.

Q. You located some land at Farragut Bay?

A. Yes, sir.

Q. Did you inform Mr. Martin that you located 320 acres of land at Farragut Bay? A. I did.

Q. You did locate 320 acres of land at Farragut Bay? A. Yes, sir.

Q. You informed Mr. Martin of that fact?

A. Afterwards.

Q. Before he had paid this $300.00, didn't you?

A. No, sir.

Q. When did you inform him?

A. I don't remember. It was in the Narrows.

Q. That was the only time you informed him relative to this 320 acres? A. Yes, sir.

Q. You didn't write him a letter on or about the 19th of September? A. I don't remember.

Q. Then, if you did write him a letter at that time, you informed him then, didn't you, that you had located 320 acres of land? A. I don't remember.

Q. That $1200.00 note was given on the 28th of August, wasn't it?

A. I don't know when it was given, the date.

Q. It was given at the time of the transaction, wasn't it? A. Yes, sir.

Q. Payable in thirty days, wasn't it?

A. I don't remember when it was payable.

Q. And then in the meantime, I want to ask you if you didn't write to Mr. Martin that you had located 320 acres of land at Farragut Bay?

(Testimony of George C. Burford.)

A. I don't remember.

Q. You might have so done?

A. I don't remember.

Q. I will ask you if you recognize that writing on the back there?

(Shows witness letter.)

A. That may be my writing.

Q. Well, is it?

A. No, I don't exactly recognize it.

Q. Turn to the other side of the paper.

A. Yes, sir.

Q. You have turned to it. Whose writing is that?

A. That is my writing.

Q. Now, turn to the back of the paper and tell the jury whose writing that is.

A. That may be my writing. I wouldn't say it is my writing.

Q. Will you say it is not?

A. No, sir and I won't say it is.

Q. You won't say it is? A. No, sir.

Q. What is the date of that? A. 9/19.

Q. What does that mean?

A. September 19th.

Q. You wrote it? A. Yes, sir.

Q. What year? A. 1905.

Q. You say you wrote the letter, but you won't say you wrote that on the back of it?

A. No. I won't deny it, nor I won't affirm it, because when I wrote that I may have been out at work and like that, and it does not look exactly like my writing, but I won't deny it.

(Testimony of George C. Burford.)

Q. When did you locate that land?

A. I located that land about the 10th of September.

Objected to by counsel for defendants as immaterial.

(After argument.)

Objection overruled.

Q. Now, you say that is your letter. Now read that letter, and I will ask you—in that letter that was written on the 19th of September you refer to a scow. What scow was it?

Counsel for defendants objects to anything about the scow in September, when the deal was closed in August, as immaterial. Objection overruled.

Q. What scow was that that you referred to?

A. That was the scow "Skagitt."

Q. The "Skagitt" sunk then before the 19th of September?

A. No, I wrote this letter from Petersburg. It was afterwards.

Q. Now, I ask you to tell the jury what scow had been sunk when you wrote this letter?

A. We got her to Farragut Bay—

Q. Answer my question. What scow had been sunk when you wrote this letter, that you refer to in this letter? A. Both scows had been sunk.

Q. Which scow did you refer to?

A. I referred to the scow "Skagitt."

Letter marked for identification Plaintiff's Exhibit No. 6.

(Testimony of George C. Burford.)

Mr. BARNES.—I offer it in evidence.

Mr. HELLENTHAL.—The letter is immaterial, your Honor, but I have no objection to it.

Mr. BARNES.—We offer it for the purpose of showing the representations made by this plaintiff about locating the 320 acres of land.

The COURT.—It may be received in evidence.

Plaintiff's Exhibit No. 6 received in evidence and read to the jury, as follows:

[Plaintiff's Exhibit No. 6.]

Petersburg, 9/19/05.

Mr. J. W. Martin,

Haines, Alaska.

Dear Martin: I just got into this port tonight, have had some very bad weather. If we had of been one day later, we could not have gotten to Farragut.

After your leaving Juneau, I begun to think that this would be a better proposition with you and I alone. I have purchased J. B. Caro Co. interest, and you can have one half of it at any time, and we have the store right. You can put your own store in. I had to get out of Juneau on the ebb tide at noon, the glass changed which meant more to me and I told my folk to write you the particulars, which no doubt she did. The Seolin get the third that J. B. Caro Co. had, and does not effect your interest one particle as to profits, only helps it. We had a big storm coming and the scow sunk, but from plugs being forced out, and we beached her and run water from her. She did not leak a drop. Sound as a dollar. Lost one dory, and about 8 ton of salt, but were fortunate that we

(Testimony of George C. Burford.)

got off as well as we did. If we had been one day later we could never have got over the Taku. I am going to build another building for store, have the lumber ordered now, and all this will cost you is the ½ of the ⅓ to you as soon as you get here, there will be plenty of time for the stock to get here, will write you later.

If we had had the launch, we would have been up against it for sure, but with Seolin and 4 men and burning wood that we chop it is very much cheaper than launch. I am sending you a list of fishermen supplies that we will need. Will write as soon as I can did you sign contract for boxes?

BURFORD.

Martin, I think we have a great thing now we can control this as equal pardners.

(Endorsed) Have located 320 acres of land at farragut.

Mr. BARNES.—You stated nothing about any option in that letter, did you? A. No, sir.

Q. You told him that a stock of goods could come to that store later, didn't you?

A. The letter stated it.

Q. And that was before the time for the payment of this $1200, wasn't it?

Mr. HELLENTHAL.—I object to that as immaterial, if your Honor please. There is no evidence yet as to when the $1200 was paid.

Objection overruled.

Mr. BARNES.—Q. Now, you have explained to the jury everything that was said by you to the plain-

(Testimony of George C. Burford.)

tiff in this case, Mr. Martin, concerning the land at Farragut Bay from the time that you first commenced to talk to him until the last time that you talked to him, have you?

A. Until that last time I talked to him?

Q. Yes, until the last time you talked to him at all.

A. Until the last time prior to closing the deal?

Q. No, from the first time until the last time, throwing both deals in.

The COURT.—What do you fix the dates?

Mr. BARNES.—Q. From the first time you talked to him until the last time, as you have testified on the stand.

The COURT.—Q. He asks you if you have detailed all the conversation, all that you said to Mr. Martin about the Farragut Bay proposition between the first and last conversations to which you have testified on the stand?

Mr. HELLENTHAL.—Touching the Farragut Bay property?

The COURT.—Yes, sir, that is what he asks.

A. I don't know.

Mr. BARNES.—Q. You have testified to all that you said to him about it, haven't you?

A. No, I think not.

Q. What did you leave out?

A. Oh, I don't remember.

Q. In response to the question to tell all that was said, you answered, didn't you?

(Testimony of George C. Burford.)

A. I may have answered, but there is quite a number of things that I didn't state.

Q. What were some of the things that you didn't state?

A. At the present time, I don't remember.

Q. You have stated then, as far as your recollection goes, everything that you said to him in regard to that Farragut Bay property, haven't you?

A. No, I don't think I have.

Q. Tell the jury what you didn't say.

A. I don't know. I can't remember all the things we talked about.

Q. How do you know that you haven't told it all, then? A. Well, I don't know.

Q. So far as you know then, you have told it all, have you?

A. I don't know. I don't remember. It was a long time ago, and I thought it was settled, and I didn't pay any more attention to it.

Q. When did your option expire?

Question withdrawn.

Mr. BARNES.—I move to strike all the testimony in relation to that option for the reason that the option was in writing and the witness has not shown due diligence in attempting to procure the writing, and the fact of the writing was not ascertained before the cross-examination. I move to strike it and that the jury be instructed not to consider any testimony concerning that option.

The COURT.—Q. Did you exhibit the original option to this plaintiff? A. No, sir.

(Testimony of George C. Burford.)

Q. You just told him about it?

A. I explained to him, yes, sir, told him all about it.

Motion denied.

Plaintiff excepts.

Mr. BARNES.—Q. You didn't write him anything in the letter about the option, did you?

A. No, sir.

Q. You didn't, in writing about this land that you had located, say anything about the option, did you?

A. In this letter, no, sir.

Q. In any of the letters that you have written to the plaintiff that has been read on the stand here. There had been nothing said to him about that option at all, had there? A. I don't know.

Q. The only thing that you said to him about it was your own talk to him that you had an option?

A. Yes, sir.

Q. You said in answer to the Court's question that the option was not shown to Martin?

A. I don't think so.

Q. It was here at the time of the transaction?

A. Yes, sir.

Q. You say you showed him your stock-book?

A. Yes, sir.

Q. Why didn't you show him your option?

A. It was not necessary.

Q. He took your word, did he?

A. Yes, sir.

(Testimony of George C. Burford.)

Q. He didn't take your word when you said you owned the property and had a right to sell it, did he?

Mr. HELLENTHAL.—We object. This man don't know what Martin did, whether he took his word or not.

Objection sustained.

Mr. BARNES.—Q. Where was that option at the time you were dealing with Mr. Martin?

A. I don't know where it was.

Q. Don't know whether it was in Caro & Company's safe or in your safe?

A. I don't know where it was.

Q. When did you take it to Wrangell Narrows?

A. When I went back from being here on the grand jury, I think.

Q. You took it then to Wrangell Narrows?

A. I don't remember. I took a lot of papers, deeds and life insurance policies and things to Wrangell Narrows. I don't know what.

Q. When did you go to Wrangell Narrows?

A. After the grand jury rose.

Q. That was after the sale with Martin, was made, wasn't it? A. Yes, sir.

Q. Then after the sale to Martin was made, you took the papers to Wrangell Narrows, didn't you?

A. If I took them, I did.

Q. When did you go to Wrangell Narrows first?

A. I went to Wrangell Narrows some time I believe in the latter part of September or the first of October.

(Testimony of George C. Burford.)

Q. You went to Wrangell Narrows after the trade had been made with Mr. Martin, didn't you?

A. Yes, sir.

Q. And if there was any option, you took it from here with you then, didn't you? A. No, sir.

Q. When did you take it?

A. If I took it, I took it down after I had been up here on the grand jury.

Q. That was after the deal with Martin was made? A. Yes, sir.

Q. If you took it to Wrangell Narrows, you took it after the deal was made with Mr. Martin, didn't you? A. If I took it there, yes, sir.

Q. You have already sworn that the option was here at the time you made this bill, have not you?

A. I thought it was here.

Q. If it was in existence at all, it was here, wasn't it? A. Yes, sir, I think so.

Q. Where was the option made out?

A. The option was made out on board of the "Rustler."

Q. Who was present and saw it made out?

A. Mr. Johnson and myself.

Q. And who else?

A. There was other parties there, but there was nobody witnessed it.

Q. Don't you, Mr. Burford, as a business man, that in Alaska no title or interest in real estate can be passed unless two witnesses attest to the signatures signed on the paper? A. No, sir.

Mr. HELLENTHAL.—I object to having my client examined for admission to the bar.

(Testimony of George C. Burford.)

The COURT.—The answer is in.

Mr. BARNES.—Q. You say that simply you and Mr. Johnson went aboard the "Rustler" and wrote out what you call an option? A. Yes, sir.

Q. Do you know what an option is?

A. I don't know as I could define an option.

Q. Why do you say it is an option?

A. Because he gave me an option for something like ten months.

Q. Now, what is an option?

Mr. HELLENTHAL.—I object to that. I don't believe that even Blackstone could define that.

Objection overruled.

Mr. BARNES.—Q. What is an option?

A. If a man makes a writing giving me for a specific length of time the right to purchase any piece of property, that would be an option, and I have the right between certain dates to take up that property, to buy it from him.

Q. Now, what are the requirements of an option as to the signing and sealing thereof?

A. I don't know.

Q. How many witnesses does the statute require must attest the signature of the person giving the option before it is a legal option in Alaska?

Mr. HELLENTHAL.—I object to the question as immaterial and irrelevant, calling for a legal answer of the witness. The only question in this case is whether he told him he had an option. It is not a question of whether it was an option, and it does not

(Testimony of George C. Burford.)

make any difference whether this witness knows what the law is in regard to options or not.

The COURT.—He is presumed to know the law. If he knows what the requirements are, he may testify.

Stenographer reads question.

Mr. HELLENTHAL.—As a matter of law, no witnesses are required. Therefore, that being the law, it would be very unfair to ask a witness how many are required.

The COURT.—I overrule the objection. He may answer if he knows.

A. I don't know.

Mr. BARNES.—Q. You don't know whether it was an option or not, do you?

A. I thought it was an option, sir.

Q. You don't know whether it was such an option as would compel the party to convey the land to you, do you? A. It was.

Q. It was? A. Yes, sir.

Q. Then it was executed according to the law, wasn't it?

A. I thought it was according to law.

Q. Then you don't know?

A. I thought it was.

Q. Then you didn't know when testifying about the option whether it was an option or not?

A. It was an option, sir.

Q. Answer the question that I asked, please.

The COURT.—I think that is well enough.

(Testimony of George C. Burford.)

Mr. BARNES.—Very well, if the Court is satisfied.

Redirect Examination.

Mr. HELLENTHAL.—Q. George, did that 320 acres of land that you located at Farragut Bay have anything to do with the land covered by this option?

Objected to by counsel for plaintiff as immaterial. Objection overruled.

A. No, sir.

Q. Where was it situated?

A. About three miles from I had the option on.

Q. You told here something about a storm that you encountered at Farragut Bay, and going to Farragut Bay. Tell the jury all about it.

Objected to by counsel for plaintiff as immaterial. Objection sustained.

Q. You said you were going to build another store. Were you going to build another, George?

A. I figured on taking another site.

Q. Not the site in the option? A. No, sir.

Q. There is nothing in that letter that is not true, is there?

A. Everything is true in that letter.

Q. The log float, where is that, George?

A. That is at Windham Bay.

Q. It is there yet, isn't it?

A. If somebody has not taken it away, it is.

Q. Martin has got his interest in it?

A. Yes, sir.

Q. Did you take the "Volunteer" to Wrangell Narrows? A. Yes, sir.

(Testimony of George C. Burford.)

Q. And the "Skagitt"?

A. Yes, sir.

Objected to by counsel for plaintiff as leading.

The COURT.—Don't lead him.

Mr. HELLENTHAL.—That is all.

[Testimony of Charles E. Hooker, Recalled for the Defendants.]

CHARLES E. HOOKER, being recalled as a witness for the defendants, testified as follows:

Mr. HELLENTHAL.—Q. You have been sworn? A. Yes, sir.

Q. Your name is Charles Hooker?

A. Charles E. Hooker.

Q. Do you know the defendant, Mr. Burford?

A. Yes, sir.

Q. Do you know the plaintiff, Mr. Martin?

A. Yes, sir.

Q. Were you present in Caro & Company's office in the year 1905 when a conversation was had between George Burford and the plaintiff Martin in which Burford explained to Martin the various things he had in connection with this fishing outfit, and explained to him fully that he had an option on the store and fishing site at Farragut Bay?

Mr. BARNES.—To which we object as leading, and it involves more than two questions in one. In the third place, it is endeavoring to prove by this witness the facts of allegations alleged in this answer, which the Court has said that they could not prove, inasmuch as the ruling of the Court was

(Testimony of Charles E. Hooker.)

that they should specify whether those representations were in writing or by parol, and they didn't do it, and we are not prepared to meet the defence.

Mr. HELLENTHAL.—It is an impeaching question.

Mr. BARNES.—Then we object on the ground that if it is for the purpose of impeachment, let's see what the statute says—

The COURT.—As I remember the impeaching question, this question does not follow it.

Mr. HELLENTHAL.—I don't care to ask that as an impeaching question.

Q. Were you present in Caro & Company's office at the time these negotiations for the sale were pending, Burford acting as— How did Burford act in this matter?

Mr. BARNES.—To which we object, as the paper itself is the best evidence as to how Burford was acting.

The COURT.—It indicates the relation that Mr. Burford bore to the other parties during the negotiations. I overrule the objection.

Plaintiff excepts.

A. Mr. Burford had full charge of this Arctic Fishing & Packing Company.

Mr. HELLENTHAL.—Q. Who made the agreements with Mr. Martin? Through whom were they made? A. Mr. Burford.

Q. Now, were you present when a conversation occurred in your office, the office of Caro & Co. in Juneau, during the month of August, 1905, while

(Testimony of Charles E. Hooker.)

these negotiations were pending, between Mr. Burford and Mr. Martin with reference to the sale of this property? A. Yes, sir.

Q. Did you overhear that conversation?

A. Some of it.

Q. You may state what, if anything, was said by Mr. Burford to Mr. Martin touching his title or the title of the defendants or right to sell this fishing site and store building at Farragut Bay.

Objected to by counsel for plaintiff as tending to change the effect of the written contract.

The COURT.—This is merely corroborative testimony.

Mr. BARNES.—Then, if you please, we object to it on the further ground that it is immaterial and incompetent for the reason that it does not tend to prove any issue raised by the pleadings. The very testimony that they now seek to introduce has been, as I understand, the ruling of the Court, prohibited from being brought before the Court, because they didn't amend their answer.

The COURT.—This question is merely corroborative of the testimony of the witness Burford. I will admit it.

Mr. BARNES.—May I ask, if your Honor please, the effect? Does this testimony go to the jury for the purpose of disproving the statements made in this bill of sale that they gave him?

The COURT.—It goes to the jury for the purpose of showing the knowledge of the plaintiff at the

(Testimony of Charles E. Hooker.)

time. If that disproves any other statements, it goes to the jury for that purpose.

Mr. BARNES.—They are not permitted then by this testimony to deny this written instrument?

The COURT.—I do not understand that they are denying it.

Mr. BARNES.—If it is admitted for the purpose of denying the written instrument, I will make the objection.

The COURT.—They have already been permitted to show any knowledge that was in the mind of the plaintiff at the time. Now this witness that is now on the stand did not conduct the negotiations, but he was present, and all he can testify to is merely a corroboration of Mr. Burford, or anything that was said between the parties at that time. It is to show the knowledge that the plaintiff had at the time he entered into these negotiations, because if he accepted that bill of sale with the knowledge that the statements contained in it were not true, then he cannot maintain this action for deceit. That is an issue which was raised by your complaint and the defendants' answer. You plead his ignorance, and the defendants say he was not ignorant, that he was informed. Anything that goes to show the knowledge of this plaintiff as to the conditions there at the time he accepted that instrument and acted upon it is competent.

Plaintiff excepts.

Last question read by stenographer.

A. Mr. Burford was the manager—

(Testimony of Charles E. Hooker.)

The COURT.—Q. What did Mr. Burford say to him?

A. Well, it is a long time back. As near as I can remember, he told him the condition of the outfit.

Q. What did he say was the condition of it?

A. He told him what he had.

Q. What did he say he had?

A. Two scows, the float and paraphernalia, this option on the site at Farragut Bay.

Q. What paraphernalia?

A. The paraphernalia, consisting of seines, knives, grindstones and everything that goes with a fishing outfit.

The COURT.—The purpose of your testimony is that of corroboration, and, in order to make it effective, you must tell what was said and not summarize it or give a general idea of it, and if you cannot tell what was said, say so, if you don't remember the language.

A. I don't remember just the language that was used. Of course I know that he told him that he had these scows, the "Skagitt" and "Volunteer," the float, dories, seines and this option on this property at Farragut Bay, the fishing site.

Mr. HELLENTHAL.—Q. Where was Mr. Caro at this time?

A. He was in San Francisco, or on the way home from San Francisco.

Cross-examination.

Mr. BARNES.—Q. You have detailed all that was said? A. As far as I can remember.

(Testimony of Charles E. Hooker.)

Q. You are one of the men who signed this bill of sale, aren't you? You signed it?

A. Yes, sir.

Q. I will read and see if you said what is in here. Look at that and see who it says was the parties of the first part?

(Witness looks at bill of sale.)

A. Mr. Burford and J. B. Caro & Co.

Q. And J. B Caro & Co. is your part of it, isn't it?

A. It is supposed to be.

Q. Well, is it? A. Yes, sir.

Q. Now, hear what this paper says.

Counsel reads from bill of sale, as follows:

"And the said parties of the first part hereby covenants that they are the owners and entitled to sell the said one-third interest of all of the above described property, which said property is known as the said Arctic Fishing & Packing Company, and set over the same to the said second party."

Q. Now, you signed that, didn't you?

A. Yes, sir.

Q. And that is all that transpired between you and the plaintiff in this case, isn't it?

A. Yes, sir.

Q. And that is all that transpired between Caro and the plaintiff in this case? A. Yes, sir.

Q. Now, neither you nor Caro made any other representations about the property except that you owned the property and had a right to sell it?

A. No, sir.

(Testimony of Charles E. Hooker.)

Q. And we are suing you, aren't we?

A. I believe so.

Redirect Examination.

Mr. HELLENTHAL.—Q. Did you ever have any talks with this plaintiff yourself, Mr. Hooker?

A. We had several conversations.

Counsel for plaintiff objects to the question unless it specifies some time.

Q. During the time these negotiations were pending?

A. Oh, yes. Mr. Martin made his headquarters in our office, and we were talking most of the time.

Q. Did you have any conversation at these times with reference to the negotiations?

Objected to by counsel for plaintiff as leading.

The COURT.—I think it is leading, but it is a preliminary question. I do not well see how he could elicit the information otherwise.

A. Yes, sir, we had quite a number of conversations.

Mr. HELLENTHAL.—Q. What, if anything, did Mr. Martin tell you with reference to going into the mercantile or fishing business, what he was going to do, or what he wanted to buy into?

Objected to by counsel for plaintiff, as not redirect examination.

The COURT.—It is not redirect examination, but he can just as well testify to it now as to recall him.

A. I don't remember as there was any conversation about mercantile business. It was all about fishing business.

(Testimony of Charles E. Hooker.)

The COURT.—Q. What was this Arctic Fishing & Packing Co.? Of what was it composed?

A. At that time?

Q. Yes.

A. At that time, it was composed of Mr. Burford and ourselves. We had been shipping fresh fish to Seattle markets.

Q. That was the Arctic Fishing & Packing Company? A. Yes, sir.

Q. What relations had you with Mr. Martin?

A. None whatever.

Q. Did you do business with him?

A. We sold him some merchandise.

Q. For how long, what period?

A. I don't know. I have sold him more or less for five years, I should judge.

Q. What proportion of his goods were sold to him by you? A. Very small.

Mr. HELLENTHAL.—I wish to offer in evidence this letter, marked for identification Defendants' Exhibit "A."

Mr. BARNES.—We object to the offer, on the ground that the statute says that before a letter or other writing can be introduced, it must be introduced while the witness is on the stand. There is no witness on the stand at the present time.

The COURT.—If it is read to the jury, it must be read before the witness leaves the stand. It will be very easy to recall the witness. Is that the only objection you have to the paper?

(Testimony of J. B. Caro.)

Mr. BARNES.—We want to cross-examine the witness on the letter.

The COURT.—You may have him on for cross-examination.

[Testimony of J. B. Caro, Recalled for the Defendants.]

J. B. CARO, being recalled as a witness in behalf of the defendants, testified as follows:

Mr. HELLENTHAL.—Q. Your name is J. B. Caro? A. Yes, sir.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. I show you a paper marked for identification Defendants' Exhibit "A," and ask you to look at it.

Mr. BARNES.—We have sworn that we wrote that letter. A. I read it.

Mr. HELLENTHAL.—Q. You have seen that before, Mr. Caro? A. I have.

Q. Where did you get it?

Mr. BARNES.—We admit that we wrote it and sent it to him.

Mr. HELLENTHAL.—We offer it in evidence.

Mr. BARNES.—It cannot be read to the jury unless the party himself is on the stand.

The COURT.—You have admitted that it was a letter written by you.

Mr. BARNES.—Yes, sir.

The COURT.—I will receive it in evidence.

Defendants' Exhibit "A" received in evidence and read to the jury, as follows:

(Testimony of J. B. Caro.)

[Defendants' Exhibit "A."]

Haines, Alaska, Sep. 1, 1905.

Messrs. J. B. Caro & Co., Juneau.

Gentlemen: Enclosed, please find Ck. #979, $1200.00 payment note for a like amount given you and Burford. I expected to be down before this, and for that reason, did not send it before.

Yours,

J. W. MARTIN.

Send me another list of goods on hand, i. e., inventory A. F. & P. Co., as I have mislaid copy I had.

Can you tell me whether large steamers will call at Farragut Bay or not for a small shipt. or 1 or 2 passengers?

Mr. HELLENTHAL.—Q. Mr. Caro, what if any dealings did you have with the steamship companies with reference to stopping at Farragut Bay?

Objected to by counsel for plaintiff, as immaterial.

The COURT.—How is it material?

Mr. HELLENTHAL.—Well, your Honor, it is only material as part of the transactions leading up to this settlement. Burford told Martin that he had seen the steamship companies and they would stop there. We wish to show that this witness had subsequently seen the steamship companies and learned that they would not stop there.

The COURT.—I will admit it.

Mr. HELLENTHAL.—Q. What dealings did you have with the companies with reference to stopping at Farragut Bay?

A. Mr. Burford, when he left here—

(Testimony of J. B. Caro.)

Mr. BARNES.—Never mind Mr. Burford. That is not the question.

The COURT.—Whatever negotiations you had.

A. I was requested to send word down to them addressed to Petersburg when the boat would call into Farragut Bay, the big boat. Mr. Swan informed me that he would let me know.

Objected to by counsel for plaintiff on the ground that plaintiff *is not by* something that transpired when he was not present; and that it is not germane to the issues. Objection overruled.

A. I asked Mr. Swan to let me know, and he informed me subsequently—

The COURT.—Q. In writing or verbally?

A. Verbally. Mr. Swan told me that he had received word from Seattle that the boats would not call into Farragut Bay after I had asked him about when the first boats would go in there. He said it would delay them too much, the Seattle office claimed, getting through, and I wrote to Mr. Burford—

Mr. BARNES.—We object to his testifying to what he wrote to Mr. Burford.

Objection sustained.

Mr. HELLENTHAL.—Q. What, if anything, did you do subsequently towards notifying Mr. Burford as to the dealings you had with the company?

Mr. BARNES.—To which we object, if your Honor please. That cannot be a defense to this action. After all the money was paid over, it is not pertinent to the issue what he may have done after-

(Testimony of J. B. Caro.)

wards. It doesn't go to the representations there made to the plaintiff.

The COURT.—It is part of their affirmative defense as to the subsequent settlement between the parties.

Mr. BARNES.—If it refers to that, we have no objection; but unless they connect the plaintiff with it, will the Court strike it out?

The COURT.—Of course, if there is no subsequent settlement proven, it may be stricken.

A. I wrote to Mr. Burford, addressed the letter to Petersburg, and told him of that fact.

Objected to by counsel for plaintiff on the ground that the letter is the best evidence.

Mr. HELLENTHAL.—Q. Have you got that letter, Mr. Caro?

A. I don't remember whether I have or not. I could look it up pretty quick.

Q. When was this letter that you speak of written?

A. It was some time after September 8th. I don't know the exact date, but I think it was after that. I can't remember exactly.

Q. Where were you at the time these negotiations were had between these parties?

A. I was on board the "Cottage City" some place between Ketchikan and Juneau. I don't know just where.

Q. How long after the time that this bill of sale was signed was it that you had your conversation with Mr. Swan?

(Testimony of J. B. Caro.)

A. Oh, it was probably fifteen or twenty days after.

Cross-examination.

Mr. BARNES.—Q. Then you never had any agreement with the Pacific Coast Company that they would call in there at Farragut Bay, did you?

A. I never did.

Q. So far as you know, there was no agreement made by the Pacific Coast Company that they would call in there, was there?

A. Yes, sir. Mr. Swan confirmed that to me when he told me that they would not call in there.

Q. Did Mr. Swan tell you that they had made arrangements to call in there? A. No.

Q. And no other man of the steamship company told you that they had made arrangements to call in there? A. No.

Q. The only information you received was from Mr. Swan that they could not call in there, as it was forty or fifty miles out of their way?

A. That they would not call in there.

Q. And this was after Mr. Martin had paid you all the money that has been paid, wasn't it?

A. I don't think it was after he paid the $1200.00.

Q. How many days after the note was given until the $1200.00 note was paid?

A. I couldn't state. It must have been some time after the 17th or 19th of September.

Q. Doesn't this letter which you say you received, doesn't that state that he sent you the check, and it was after the trade had been made between

(Testimony of J. B. Caro.)

you and Mr. Martin, wasn't it that Mr. Swan informed you that the boats could not come in there?

A. Yes.

Q. And he never did inform you that they could come in? A. No.

Q. You had no information whatsoever that they ever would call in there? A. No.

Redirect Examination.

Mr. HELLENTHAL.—Q. Did you understand the last question Mr. Barnes asked you? He asked you if you had no information whatsoever that the steamers would call in there.

A. I had no information from Mr. Swan.

Q. Did you have any information from other sources?

Mr. BARNES.—To which we object unless the sources are connected with the steamship company.

The COURT.—Certainly. Any other reliable information that the steamships would call in there, that is any information that would connect the steamship company with it.

A. I did.

Mr. BARNES.—I move to strike that question out unless it was information connected with the steamship company. But he doesn't say what information he had, so let it go.

The COURT.—I think you should have him state the sources of his information.

Mr. HELLENTHAL.—Q. What were the sources of that information, Mr. Caro?

A. Mr. Burford told me.

(Testimony of Walter F. Swan.)

Q. What did he tell you?

Mr. BARNES.—We object to it because it is incompetent evidence.

Objection sustained.

Whereupon court adjourned to 2 o'clock P. M.

[Testimony of Walter F. Swan, for the Defendants.]

February 26, 1908, at 2 o'clock P. M.

WALTER F. SWAN, a witness in behalf of the defendants, being first duly sworn, on oath, testified as follows:

Direct Examination.

Mr. HELLENTHAL.—Q. State your name, please, Mr. Swan. A. Walter F. Swan.

Q. Where do you reside? A. In Juneau.

Q. What is your business?

A. Agent for the Pacific Coast Steamship Company and the Pacific Coast Company.

Q. Do you know Mr. Burford?

A. Yes, sir.

Q. Do you know Mr. Connor, connected with the Pacific Coast Steamship Company?

A. Yes, sir.

Q. Do you remember hearing a conversation between Mr. Connor and Mr. Burford relative to the landing of your steamers at Farragut Bay? The conversation was had during the latter part of the year 1905. Do you remember hearing such a conversation?

A. Yes, sir, I remember they had such a conversation.

(Testimony of Walter F. Swan.)

Q. Now, Mr. Swan, later in the year 1905, did you receive any word from your company down below relative to the landing of the steamers at Farragut Bay? A. I did.

Q. What was that word, Mr. Swan?

Objected to by counsel for plaintiff, as immaterial.

The COURT.—It goes to show the knowledge of the witness as to the assertions that the defendants have made, the truth or falsity of the assertions made by them.

A. I received instructions that the steamers would not call at Farragut Bay.

Q. State what you did in the way of communicating that to Mr. Caro?

Objected to by counsel for plaintiff, as immaterial. Objection withdrawn.

A. I told them that I had received such instructions and was requested to notify them.

Cross-examination..

Mr. BARNES.—Q. That is all the instructions you gave, that the boats could not stop there?

A. Yes, sir.

The COURT.—Q. Could not or would not?

A. Would not.

[Testimony of Robert Eatock, for the Defendants.]

ROBERT EATOCK, a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

Mr. HELLENTHAL.—Q. State your full name.

A. Robert Eatock.

(Testimony of Robert Eatock.)

Q. Where do you reside? A. Juneau.

Q. Do you know Mr Burford? A. Yes, sir.

Q. Mr. Martin? A. Yes, sir.

Q. What position did you occupy in the latter part of August and the month of September of the year 1905? A. Pilot.

Q. On what ship? A. On the "Seolin."

Q. Where did you go with the "Seolin" in company with Mr. Burford, if anywhere?

A. We went down to Windham Bay and got some things there, and went from there to Farragut Bay and from there to Wrangell Narrows.

Q. Do you know the scow "Skagitt," Captain?

A. Yes, sir.

Q. And the scow "Volunteer"?

A. I don't know the name of it; a little square scow.

Q. You have seen the scow down there?

A. Yes, two scows.

Q. Have you ever seen a little log-float belonging to this outfit?

Mr. BARNES.—I object to the question as immaterial unless he can bring it home to the plaintiff.

The COURT.—I do not think that any testimony that can be given in connection with the little log-float is material.

Mr. HELLENTHAL.—These are all parts of the transaction, to show the situation they are in, to show the motives of their doing it.

The COURT.—I do not think that what was done with the log float is material.

(Testimony of Robert Eatock.)

Mr. HELLENTHAL.—Q. Captain, was there any salt on these scows?

Objected to by counsel for plaintiff, as leading. Objection sustained.

Q. What was there by way of salt on the scows?

Objected to by counsel for plaintiff, as leading. Objection sustained.

Q. What was on the scows?

A. At Windham Bay?

Q. No, on the scow "Skagitt"?

Objected to by counsel for plaintiff, unless he states the time and place.

The COURT.—Q. At the time you took the scow "Skagitt," if you did take it. He says he went to those places. He does not say what he had with him.

Mr. HELLENTHAL.—Q. When you went to Farragut Bay, did you have the scow "Skagitt" and the scow "Volunteer" in tow? A. Yes, sir.

Q. When you went to Farragut Bay in August, 1905? A. Yes, sir.

Q. Now, what was in the scow "Skagitt," materials or anything else that you know of?

A. There was nothing else much from here. When we got down to Windham Bay we took some things on.

The COURT.—Q. What did you take on?

A. There was salt and the nets, seines, and some other things. I don't just remember.

Mr. HELLENTHAL.—Q. Where did you get those things, salt and seines and things, Captain?

(Testimony of Robert Eatock.)

A. At Windham Bay.

Q. Where at Windham Bay?

A. At Windham Bay on a little float there.

Q. Did you get them on this little float?

A. Yes.

Objected to by counsel for plaintiff, as leading. Objection overruled.

Q. How long did you stop at Farragut?

A. Farragut?

Q. Yes.

A. About a week, I guess.

Q. What was on the scow "Volunteer," Captain?

A. Salt and barrels and different things, and two or three tanks. I have forgotten which.

Q. Some barrels?

A. Yes. Some barrels and some lumber, a little lumber.

Q. Did you take anything from here that you remember? A. Just the scow.

Q. Did you take anything from here on the "Skagitt" in the way of salt that you remember of?

A. Not that I remember.

Q. How long did you stay at Farragut Bay?

A. About a week.

Q. Where did you go from there?

Objected to by counsel for plaintiff as immaterial.

The COURT.—It supports the theory of the defense of facts leading up to their innovation, as they claim.

Plaintiff excepts.

(Testimony of Robert Eatock.)

A. We started from Farragut Bay to go to Wrangell Narrows, and there came up a storm and we put into Portage Bay for shelter, and started out the next day.

Q. What was the weather at Farragut Bay?

A. Stormy mostly. It was a stormy period just then.

Cross-examination.

Mr. BARNES.—Q. What became of the scow "Volunteer," Captain, if you know?

A. We took her down to Wrangell Narrows.

Q. Do you know what has become of her since that time? A. No.

Defendants rest.

Whereupon a recess of fifteen minutes was taken.

[Testimony of Harry Malone, for the Plaintiff on Rebuttal.]

HARRY MALONE, a witness in behalf of the plaintiff on rebuttal, being first duly sworn, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Your name is?

A. Harry Malone.

Q. You reside in Juneau? A. Juneau.

Q. Do you know the defendants, Mr. Burford and the firm of Caro & Hooker?

A. Yes, I know those people.

Q. State whether or not, during the summer of 1903, a short time preceding the time of the purchase by Mr. Martin, if you have heard of the time of that

(Testimony of Harry Malone.)

purchase, you had any conversation with Mr. Burford concerning the affairs of that fishing company.

Objected to by counsel for defendants, unless it was some conversation that was had in Martin's presence.

The COURT.—You have two questions in that.

Mr. BARNES.—Q. Do you remember hearing of a purchase by Mr. Martin, the plaintiff in this case, of the defendants during the summer of 1905?

A. Well, I heard of their making a purchase. I don't remember whether it was in 1905. I think it was, though.

Q. Just before that, in the same summer of that purchase, I will ask you if you had some conversation with Mr. Burford relating to the Pacific Coast Steamship Company calling into Farragut Bay?

A. I did.

Q. State what that conversation was.

Mr. HELLENTHAL.—We object. It is immaterial what conversations he had and what statements he made to Mr. Malone. The question is what he said to this plaintiff, not what he said to Mr. Malone.

Mr. BARNES.—I offer to prove by this witness that they undertook to make the same kind of deal with this witness that they did with Mr. Martin. He, however, went to the headquarters of the steamship company below, at Seattle, or wherever they are, to ascertain if there had been any agreement with the steamship company, and Mr. Burford, for the steam-

(Testimony of Harry Malone.)

ship company to call into Farragut Bay, and the steamship company said there never had been any.

Mr. HELLENTHAL.—Mr. Burford talked with Mr. Conner, not the steamship company.

The COURT.—I think it would be competent to show by Mr. Malone what you offer to show as to the arrangement with the steamship company. I do not think that the fact that he had an agreement with Mr. Burford is material at all.

Mr. BARNES.—My question does not go to any agreement, but to what conversation he had about this matter.

The COURT.—I do not know as any conversation he had with Mr. Burford about the matter is material. The only thing which would be material would be something which would go to contradict the testimony as to the arrangement with the steamship company.

Mr. BARNES.—Q. State whether or not you made inquiries of the Pacific Coast Steamship Company as to whether or not they had made arrangements about calling into Farragut Bay for fish.

The COURT.—Prior to that time?

Mr. BARNES.—Q. This was a short time before this sale made to Mr. Martin. And I want to ask you if you made inquiries about the time of this sale if they had previously made arrangements with Mr. Burford to call in at Farragut Bay for fish?

Mr. HELLENTHAL.—We object, if your Honor please. In the first place, the question asks whether

(Testimony of Harry Malone.)

he talked with the Pacific Coast Company, which is a physical impossibility. In the second place, we object to it because the testimony is hearsay. You cannot prove what the contract was between these parties by someone that does not know anything about it. The way to show that is to show it by Mr. Connor. And on the third ground, that Mr. Burford did not testify he had any conversation or agreement with anyone except Mr. Connor.

The COURT.—It seems to me that the person to show that by would be the representative of the company.

Mr. BARNES.—It was the representative of the company with whom this man talked. He talked with a head man of the company. I think I have a right to discredit their testimony that much.

The COURT.—Q. With whom did you talk, Mr. Malone? A. The Pacific Coast Company.

Q. With whom in connection with the Pacific Coast Company? A. Mr. Talmage.

Q. What position did he occupy?

A. I can't tell you exactly what his position is there. But I can say that Mr. Burford told me he never had a contract with them.

The COURT.—Never mind what Mr. Burford told you. I think I shall have to sustain the objection.

Mr. BARNES.—Q. Where was this man that you talked to? What town was he in?

A. Seattle.

Q. I will ask you if he was one of the men that seemed to have charge of the office?

(Testimony of Harry Malone.)

Objected to by counsel for defendants as leading. Objection sustained.

Q. Do you know the man? A. Yes, sir.

Q. What is his business?

A. I don't know exactly what position he holds in the office.

Q. Is he an employee of the company?

A. I believe so. I understood that he was.

Q. Have you done business with him for that company? A. No, sir.

Q. Have you seen him directing the affairs of the company? A. I can't say that I have.

Q. How did you come to go to him, then?

A. I have traveled with him on the boat.

Q. In what capacity was he traveling?

A. I can't tell you that.

Q. Who was he working for when traveling?

A. I understood that he was working for the Pacific Coast Steamship Company.

Q. He was, wasn't he?

A. I understood he was.

Q. What did you go to that company to ascertain?

Objected to by counsel for defendants as immaterial and hearsay testimony.

(After argument.)

Objection sustained. Plaintiff excepts.

Cross-examination.

Mr. HELLENTHAL.—Q. When did you come to Seattle?

The COURT.—There is nothing to cross-examine on. I do not think that question is material.

(Testimony of J. W. Martin.)

Calendar from 1800 to 2000 A. D. marked for identification Plaintiff's Exhibit No. 7.

Mr. BARNES.—I offer to prove by that that the 28th of August came on Monday in 1905.

Mr. HELLENTHAL.—We will concede that the 28th of August came on Monday of that year. It is admitted in the record that the 28th of August, 1905, was on Monday.

Mr. BARNES.—Then I can withdraw this calendar, if the Court please?

The COURT.—Yes, it may be withdrawn.

[Testimony of J. W. Martin, Recalled for the Plaintiff on Rebuttal.]

J. W. MARTIN, the plaintiff, being recalled, on rebuttal, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Mr. Martin, there was a letter read to the jury this morning purporting to be written by you and which we said was written by you, to what you referred when you said, "Can you tell me whether large steamers will call at Farragut Bay or not for a small shipment or one or two passengers"?

Objected to by counsel for defendants as immaterial. Objection overruled.

Q. To what did you refer, Mr. Martin, when you made those inquiries as to shipments and passengers and one thing and another?

A. I referred to the shipment of goods from Haines to Farragut Bay.

(Testimony of J. W. Martin.)

Q. Who were the one or two passengers that you referred to?

A. Myself and a man to help in the store.

Q. Now, there has been introduced in evidence a receipt that was given by Mr. Burford to you. I wish you would tell the jury to what articles that receipt refers when it says certain articles were missing from the original invoice, the cancellation is to make right certain missing articles. Tell the jury what articles they were.

A. There were two dories missing.

Q. Fishing boats?

A. Yes, sir. One log-float, tierces, salmon trough, lines and gear to the scows.

Q. What about the scow "Volunteer"?

A. The scow "Volunteer" was there, but in a sunken condition.

Q. What about what salt was there?

A. All the salt that was received was second-hand salt and didn't amount to anything.

Q. Tell the jury whether at that time there was any mention made by Mr. Burford to you concerning the Farragut Bay property?

A. There was nothing whatever mentioned about the Farragut Bay property at that time,

Q. At that time, tell the Judge and jury whether or not you had any knowledge that they did not own the Farragut Bay property when they sold it to you?

A. I had not.

Q. You heard the testimony this morning and yesterday of statements being made to you that Mr.

(Testimony of J. W. Martin.)

Burford only had an option on that property. Now, were those statements made to you, or were they not?

Mr. HELLENTHAL.—We object. He has already gone over that in his direct case.

Objection overruled.

A. They were never made to me.

Q. Was any other statements made to you about the ownership of the property than the statements made in this written bill of sale or deed that you had?

A. None other.

Q. And when was it? You did testify on direct examination when the time was that you ascertained that they did not own the Farragut Bay property, didn't you, or did you not?

A. Not until a short time before the bringing of this action.

Q. I understand you, then, to say that you did not know anything about their not owning the property until shortly before this action was commenced?

A. I did not.

Q. Now, this bill of sale was made on August 28th, I believe the record shows, does it not?

A. I think that is right.

Q. Now, look at that receipt and see when that was dated.

A. (Witness examines receipt.) December 15, 1905.

Q. Now, from August 28th to December 15th, I will ask you if there had ever come into your possession or to your knowledge, if you had ever seen anything of this float that they talked about?

(Testimony of J. W. Martin.)

A. I never did.

Q. How many trips had you made to Wrangell Narrows at the time this bill of sale was signed?

A. I think it was three trips.

Q. You say this was the second or third trip since December? A. I think three times.

Q. Tell the jury if you had ever seen that float at that time? A. No, for it was not there.

Q. Have you ever seen it since?

A. I have not.

Q. Mr. Martin, how about the nets or seines, are they the same thing in the fishing business?

A. Substantially, yes.

Q. Did you mention them in your examination, that they were some of the articles for which this reduction was made?

A. Yes, sir, the nets were worthless.

Q. Had they told you, Mr. Martin, that they simply had an option on that Farragut Bay property, tell the jury whether or not you would have paid this money and made the purchase.

Objected to by counsel for defendants as having been gone over in the case in chief.

Question withdrawn.

Cross-examination.

Mr. HELLENTHAL.—Q. Now, what was it that you bought that is in the bill of sale that you didn't get? A. I went over them a few moments ago.

The COURT.—Answer the question.

A. There were two dories.

(Testimony of J. W. Martin.)

Q. Now, take that bill of sale and show me where it says two dories.

Mr. BARNES.—If the Court please, he didn't refer to the bill of sale. He didn't say the bill of sale. He says the inventory.

Question withdrawn.

Mr. HELLENTHAL.—Q. So there really was an inventory, Mr. Martin? A. Is that a question?

The COURT.—Answer the question.

A. I have never seen any.

Mr. BARNES.—He does not say there was an inventory, if the Court please.

Mr. HELLENTHAL.—Q. You have never seen an inventory? A. I never have.

Q. How do you know what was missing from the inventory if you never saw it?

A. I didn't state they were missing from the inventory. They were missing.

Q. What were they missing from?

A. They were missing from the outfit.

Q. Did you know what the outfit contained?

A. I took their word for it.

Q. Did you buy anything that was not described in the bill of sale?

A. These things that belonged to the same and supposed to have been with the same outfit, yes, sir.

Q. Who told you they were missing?

A. Burford himself.

Q. He came to you and made a confession that two dories were missing. Is that true?

A. He did.

(Testimony of J. W. Martin.)

Q. How about that log-float? When you bought that log-float it was down at Windham, wasn't it?

A. I couldn't tell you.

Q. Didn't Burford tell you that?

A. He told me it was.

Q. Isn't it there? A. I don't know.

Q. You never went to look for it?

A. I did not. I couldn't get there.

Q. You went to Wrangell Narrows, didn't you?

A. Yes, sir.

Q. It was not in Wrangell Narrows?

A. No, sir.

Q. You don't mean to say there was no log-float at Windham Bay when he sold you the stuff?

A. I had no way of knowing whether it was or not.

Q. You took his word for it?

A. I did at the time.

Q. You know when they first came to Wrangell Narrows, when they were driven out of Farragut Bay by a hurricane. A. I don't know it.

Q. You have heard of it? A. Yes, sir.

Q. That log-float could not have been towed down there under those circumstances, could it?

A. It could have been with the rest of the outfit.

Q. Was it any part of Burford's agreement that he was going to take your log-float to Wrangell Narrows when he sold you this stuff?

A. There never was any agreement about towing any part of this outfit to Wrangell Narrows.

(Testimony of J. W. Martin.)

Q. He sold you one-third interest in the stuff that was at Windham Bay, didn't he?

Objected to by counsel for plaintiff, on the ground that the bill of sale is the best evidence, and on the ground that the question assumes a fact to exist that has not been proven. Objection overruled.

The COURT.—There is testimony here to the effect that part of the outfit was at Windham Bay. Now, if that is part of the articles in which this witness bought an interest, he may answer the question.

A. I think he said there were some things at Windham Bay. I didn't pay any attention to it. I didn't care where it was.

Mr. HELLENTHAL.—Q. You were just buying an interest in the stuff regardless of where it was? Isn't that so, Mr. Martin?

Objected to by counsel for plaintiff as assuming a fact to exist that is not in the evidence. Objection overruled. Plaintiff excepts.

A. That was the stuff that was, as I said, considered as—

The COURT.—Answer the question.

Question read by stenographer.

A. Yes.

Mr. HELLENTHAL.—Q. What else was missing? A. The salmon troughs were missing.

Q. Were there any salmon troughs at all there?

A. I think there was one.

Q. Were there any on the log-float?

A. I don't know.

(Testimony of J. W. Martin.)

Q. And there was one salmon trough on what scow? A. It was on the beach when I saw it.

Q. You don't know how many salmon troughs there were on the log-float?

A. They wrote that they picked up every one when they went down.

Q. Answer my question. You don't know how many salmon troughs were on the log-float when you bought this stuff, do you? A. I don't know.

Q. You don't know how many salmon troughs were actually in existence when you bought this stuff, do you? A. No, sir.

Q. Where do you get the number of salmon troughs that were to be delivered to you? Did Burford tell you how many he would give you?

A. He said salmon troughs and there was only one salmon trough in evidence.

Q. At Wrangell Narrows? A. Yes, sir.

Q. What else was missing?

A. There was a seine there that was absolutely worthless. We called it missing.

Q. It was there, wasn't it?

A. Pieces of it, yes.

Q. That was a month after you had bought in, wasn't it? A. I think it was.

Q. If it was there, it was not missing, was it?

Objected to by counsel for plaintiff, on the ground that it is a fact for the jury to determine. Objection sustained.

Q. Was that seine missing?

A. Yes, the seine as a whole was missing.

(Testimony of J. W. Martin.)

Q. Didn't you just say it was there?

A. Pieces of it.

Q. It had been wrecked since you bought it? Isn't that the idea? A. I don't know.

Q. What else was missing?

A. Lines and gear.

Q. Never mind about that paper.

Mr. HELLENTHAL.—If he is testifying from that paper in his hand, I object to it.

The COURT.—Put the paper in your pocket.

Mr. HELLENTHAL.—Q. What else was missing? A. Lines and gear.

Q. Don't you know those lines were lost in the storm after you had bought the stuff?

A. No, sir.

Q. There were some lines that weren't on the "Volunteer" that Burford said ought to have been there?

The COURT.—Are you testifying?

Mr. HELLENTHAL.—I am asking the question.

Q. There were some lines that belonged to the "Volunteer" that were not on the "Volunteer"? That is the question. I intended to ask it with a rising inflection.

The COURT.—All right.

A. There was nothing in sight, sir.

Q. When you got to Wrangell Narrows?

A. Yes, sir.

Q. Did you look at your invoice?

A. I didn't have any invoice.

Q. You never had any?

(Testimony of J. W. Martin.)

A. No, sir, not after it was supposed to have been sent to me.

Q. What else was missing?

A. Salmon tierces, I think.

Q. What else was missing?

A. I think that is about the extent of the missing articles.

Q. You are not so sure about the missing articles now as you were before you put that list in your pocket, are you?

A. I think I have gone over them pretty well, sir.

Q. Now, tell us all that was missing if you can.

A. Two dories missing, the tierces, the lines and gear, the salmon net.

Q. Salmon net—did you buy a salmon net too?

Mr. BARNES.—If the Court please, I object to the question for this: The bill of sale calls for all things known pertaining to the Arctic Fishing & Packing Company.

Objection overruled.

A. Yes, sir, I bought an interest in it.

Q. Did you see that salmon net before you bought it? A. I did not.

Q. You know it is not described in that bill of sale, don't you, Mr. Martin?

A. I don't think it is.

Q. Then by what sort of contract or lease or anything else did you buy it, if you didn't have an inventory?

(Testimony of J. W. Martin.)

A. Burford told me that there was a salmon net went with the outfit after we got down there.

Q. You got an ice machine, too, didn't you?

Mr. BARNES.—To which we object, because it doesn't appear in evidence that there was an ice machine there.

Objection overruled. Plaintiff excepts.

A. No, sir, I never got it.

Q. Wasn't there any on the scow?

A. There was not any on the scow. There was one there, yes.

Q. Didn't you keep it with the outfit?

A. I didn't get it, didn't have anything to do with it.

Q. It was there with the outfit, wasn't it?

A. It was there, yes.

Q. It went with the outfit, didn't it?

A. No, sir, it belonged to other parties, so Burford represented.

Q. What else was missing?

A. I think I have gone over the articles.

Q. Now, that is all that was missing?

A. Yes, sir.

Q. Now, tell me just what those missing things were worth.

Mr. BARNES.—To which we object because there is no question of value in this case, and they cannot prove it; and it is not cross-examination.

The COURT.—Well, there might be a question of value on the defendants' theory, or rather on the plaintiff's theory, in the case that the return of this

(Testimony of J. W. Martin.)

$500.00 note was a compensation for the articles missing. It is to compensate him for the articles that are gone out of the outfit.

Mr. BARNES.—It doesn't appear that there was a valuation fixed on the articles at all.

The COURT.—I overrule the objection.

Plaintiff excepts.

Question read by stenographer.

Mr. HELLENTHAL.—Q. Starting with the two dories, what were the two dories worth?

Mr. BARNES.—Providing he knows.

The COURT.—Certainly.

A. The dories were supposed to be worth $40.00 or $50.00 each.

Mr. HELLENTHAL.—Q. What is the next thing?

A. Oh, those salmon troughs and tierces.

Q. How much were the salmon troughs worth?

A. I don't know. The whole thing, taken as a whole, was figured in as a cancellation of this note.

Q. The whole valuation, not your third but the whole valuation was $1500.00 placed upon this property, wasn't it?

Objected to by counsel for plaintiff, as assuming a fact not in the evidence.

The COURT.—What do you mean by that question?

Mr. HELLENTHAL.—Upon the missing stuff.

The COURT.—If he knows, he may say.

Mr. BARNES.—There is a difference between the cancelling of a note and the paying of money. Now,

(Testimony of J. W. Martin.)

if your Honor please, I don't want to be in contempt of Court by arguing after the question is decided, but with the permission of the Court I would say this: There might be such words spoken as would cause the cancellation of a note but not the payment of money. He does not say anything was paid. He says as a lump sum this note was cancelled. Counsel is proceeding on the theory that this note was $500.00 in money. He has not testified to any value, but he simply says that the note was cancelled for the whole thing. It assumes a value when no value has been proven.

The COURT.—Anybody understands that. Still that will not prevent this question from being answered.

Plaintiff excepts.

A. We didn't place a valuation on it.

Mr. HELLENTHAL.—Q. Wasn't a $500.00 note given by you cancelled to offset a third interest in the property that was lost?

A. As a compromise for the missing articles, yes.

Q. You then as a matter of fact, got the worst of that settlement, Mr. Martin? Is that what you mean to say ?

Mr. BARNES.—To which we object, as not the evidence.

Mr. HELLENTHAL.—I am asking him.

Objection overruled.

A. I accepted this as a settlement.

Q. You accepted that as a settlement for the missing things? A. Yes.

(Testimony of J. W. Martin.)

Q. By so doing, didn't you value the third interest in the missing things at $500.00?

Mr. BARNES.—He has already said that there was no value placed upon them. I object to the question.

The COURT.—It is cross-examination. I think it is proper. A. I did not.

Q. You didn't place any value on the things, Mr. Martin? A. No, sir.

Q. They were not worth much?

A. No, sir, they weren't worth much.

Q. The things that were lost weren't worth much, is that what you mean? A. Yes, sir.

Q. You kind of got a little the best of Burford. Isn't that what you mean? A. No, sir.

Q. Your note was not worth much either, is that what you mean?

A. I would like to have that made a little more definite. I don't know what you are driving at.

Q. Was your note worth much?

A. My note has always been considered pretty good.

Q. Your $500.00 note was worth $500.00, wasn't it, Mr. Martin? A. I think so.

Q. Then you didn't get the best of Burford when you settled with him, he giving you a $500.00 note which was worth $500.00 for the missing stuff which was worth very little. Is that what you mean?

A. Yes, sir.

Q. That is why you settled? The stuff that was missing, didn't amount to much? A. No, sir.

(Testimony of J. W. Martin.)

Q. Yet you were willing, of course, to settle with Mr. Burford providing you got $500.00 for it?

A. Yes, sir.

Q. Who first broached this matter of settling the claim, he or you? A. He did.

Q. He first broached it to you? A. Yes.

Q. How did it start? How did it come about?

A. Well, when I saw the worthless condition of the outfit there, the scow on the beach full of holes, a scow that would not sustain her own weight in the water, and the salmon net there that you could take up this way and pull to pieces like you would a piece of cheese cloth, and when I come to find out that the dories and the rest of the outfit were missing, why I told Burford that there had been a misrepresentation about those articles, and I put it to him in such a way that he seemed to see it the same way that I did and agreed to cancel the $500.00 note on the strength of the layout the way it looked there.

Q. You were very persuasive in your arguments to Mr. Burford. You put it to him in a very persuasive way. Is that what you mean?

A. I tried to.

Q. Didn't you testify that you didn't care anything much about this stuff, anyway, that what you wanted was a store site? A. Yes, sir.

Q. Then when you were talking to Mr. Burford, you were not telling the truth, or you are not telling the truth now. Is that right? A. No, sir.

(Testimony of J. W. Martin.)

Q. When you were talking to Mr. Burford at that time, representing that he ought to make good, representing that these things were lost, and making this persuasive talk to him, then you place to Mr. Burford a valuation on this fishing outfit, didn't you, Mr. Martin?

Objected to by counsel for plaintiff, as immaterial. Objection overruled.

A. I don't think we did.

Q. You told Burford just as you are telling now, "It isn't worth much, George, but you ought to give me $500.00 anyway for it"? A. I did not.

Q. What did you tell him?

A. I told him the same as I told you awhile ago.

Q. What did you tell him? Answer the question.

A. I went over the outfit as I said a moment ago and explained to him that the scow on the beach was absolutely worthless, that the other articles were missing, that the nets were rotten, etc. That is what led to this settlement.

Q. And that because these things were not just what you thought they ought to be, you ought to get your money back? Is that what you mean?

A. Yes, partly.

Q. And yet didn't you tell us here a day or two ago that you didn't pay your money for that at all?

A. I didn't care anything about that part of the outfit, no.

Q. If you didn't care about it, why did you make Burford pay you for it?

(Testimony of J. W. Martin.)

A. Since passing up this Farragut Bay proposition and going to Wrangell Narrows, the only thing left was to make the best of a bad proposition, so to make the other part of the outfit produce something, I explained to him that it ought to be worth something, for having passed up the other proposition.

Q. The other proposition had already been passed up, Mr. Martin?

A. They had passed Farragut Bay on the way down from Juneau to Wrangell Narrows, certainly.

Q. How about that scow on the beach? That was a new scow, wasn't it?

A. The "Volunteer"?

Q. Yes.

A. It was about twenty-five to forty years old.

Q. Wasn't that a cedar scow?

A. I don't know. It was represented to be by Mr. Burford. I don't think so.

Q. Do you know anything about it?

A. Yes, sir, I do.

Q. Was it or was it not?

A. There might have been a few cedar planks in it.

Q. Wasn't it a cedar scow?

A. No, not as a whole.

Q. There was not a cedar bottom to it?

A. I said there might have been a few cedar planks in it. I took a knife and went over the scow, over the planks, and of those I looked at some were cedar and some were not.

(Testimony of J. W. Martin.)

Q. Do you know cedar when you see it?

A. I think I do.

Q. That scow had a hole punched in her. Wasn't she on the beach?

A. I don't think she had any hole in her. She was just on the beach. When the tide was in she was partly in the water and when the tide was out she was on the beach.

Q. The scow was not sunk when you bought her?

A. I don't know.

Q. She was towed to Wrangell Narrows from Windham Bay, wasn't she?

A. Yes, but I think she was towed full of water.

Q. You don't know that, do you?

A. No. I was told so.

Q. Who told you?

A. I think some of the men on the steamers told me.

Q. And you knew nothing about that Farragut Bay business at all? A. No, sir.

Q. Burford didn't tell you anything about the fact that they were going to give up at Wrangell Narrows? A. He did not.

Q. You were still to continue to keep your property at Farragut Bay. Is that it?

A. There was nothing said about it at all one way or another.

Q. That was not part of the $500.00 consideration or $1500.00 for the whole? A. It was not.

Q. You never found out anything about any title of Burford's to the Farragut Bay property until you brought this suit. Is that right?

(Testimony of J. W. Martin.)

A. No, sir, I didn't.

Q. About three years after the time you first bought in there?

Mr. BARNES.—To which we object. We object to the witness testifying to a different proposition than what the record shows.

Objection sustained.

Mr. HELLENTHAL.—Q. It was just before that that you found that Burford had an option at Farragut Bay, and didn't own the ground?

A. I didn't find out anything about an option. I just found that he didn't own it.

Q. Who told you so?

A. I had a letter from down there.

Q. From whom? A. From Johnson.

Q. Have you that letter?

A. I don't think I have.

Q. How came Johnson to write you a letter?

A. I wrote to Johnson to find out about the ownership of it. I had been trying for six months to get a man in there and get word from there, and I finally got a letter from Johnson a long time after I had written him.

Q. How long was that before you brought this suit?

A. Oh, it was three or four months, I guess.

Q. You never mentioned this matter to Mr. Caro or Mr. Hooker, or Mr. Burford, or anybody else before you brought this suit, did you?

Mr. BARNES.—We object to that as immaterial, and it doesn't preclude him from a recovery.

(Testimony of J. W. Martin.)

Objection overruled. Plaintiff excepts.

Question read by stenographer.

A. I don't remember now.

Mr. HELLENTHAL.—Q. Where was Burford at the time when you brought this suit?

A. Burford, I think, was at Valdez.

Q. Didn't you bring this suit just because you knew Burford was in Valdez and you thought you could work Caro & Co. for some money?

A. I did not.

Q. Didn't you go down there and try to blackmail them since this suit was brought?

Objected to as insulting to the witness. Objection sustained.

Q. Didn't you go down there and tell Jules Caro that if he didn't come through with some $1200.00, you would go before the grand jury, of which you were a member, and have George Burford indicted in his absence in Valdez? A. I did not.

The COURT.—Wait a minute. Give the time and place and persons present.

Mr. HELLENTHAL.—Q. When were you on the grand jury, Mr. Martin?

A. I don't remember. The term before this at Juneau here.

Q. Didn't you at that time while you were on the grand jury—

The COURT.—There may have been two grand juries here that term.

Mr. BARNES.—We object to it. The record is the best evidence.

(Testimony of J. W. Martin.)

The COURT.—You had better find out definitely.

Mr. BARNES.—It was after this suit was brought, and it is immaterial.

The COURT.—The answer to that last question and the last question itself may be stricken out.

Mr. HELLENTHAL.—Didn't you, Mr. Martin, during the time that you were serving on the grand jury, the term commencing in the latter part of November, 1906, or some time shortly after the commencement of the term, maybe in the early part of December, or about that time, go into J. B. Caro & Company's office and say to Mr. Caro that if he did not pay you $1200.00 you would have George Burford indicted by the grand jury, you and Mr. Caro being present? A. I don't remember.

Q. Did you or did you not make that statement?

A. I don't think I did.

Q. Now, Mr. Martin, when Charlie Hooker says that he heard George Burford tell you that he had an option at Farragut Bay, he was mistaken, wasn't he? A. Say that again, please.

Q. When Charlie Hooker testifies that he heard Burford tell you while these negotiations were pending that he had an option on this Farragut Bay building and site, he was mistaken, wasn't he?

A. Yes, sir.

Q. And George Burford also was mistaken when he made the statement that he did tell you that?

A. He certainly was.

Q. You are sure about that? A. Yes, sir.

(Testimony of J. W. Martin.)

Q. You are just as sure about that as you are about the fact that you never had an inventory?

A. Well, the inventory might have been received, but I have no recollection of it.

Q. But you have a recollection so strong that you know that this conversation did not occur to which these gentlemen have testified?

A. I know positively that it didn't.

Q. Upon that point you are positive?

A. Yes, sir.

Q. Upon the point of the inventory since seeing the letter in which you admit seeing the inventory, you are not so positive?

Mr. BARNES.—I object to his saying that he admitted that he saw the inventory. He admitted losing an inventory and he asked for another one and they did not send it.

Question read by stenographer.

A. No, sir, I am not.

The COURT.—Wait a minute. I do not think the letter admits that he saw the inventory. If you want to refer to the letter, refer to it in the language of the letter.

Mr. HELLENTHAL.—Q. You did write in this letter, "Send me another list of goods on hand, i. e., inventory A. F. & P. Co., as I have mislaid copy I had." Did you not so write?

Objected to by counsel for plaintiff, on the ground that the letter speaks for itself. Objection overruled.

A. Yes, sir.

Q. Then you did have a copy, isn't that true?

(Testimony of J. W. Martin.)

A. Evidently, from that, yes.

Q. Now, Martin, you sued for $3,000.00, didn't you? A. Yes, sir.

Q. You sued for $2,000.00 actual damages which you said you had paid out, didn't you?

A. Yes, sir.

Q. And yet all the time you had in your possession this receipt of George Burford cancelling this $500.00 note, didn't you? A. Yes, sir.

Q. Now, why did you sue for $2,000.00 and say that you had paid $2,000.00, when in fact you were only out $1,500.00?

A. The note was still out. It could have been presented for payment at any time.

Q. When the note was presented for payment, couldn't you have presented your receipt cancelling it and offset it?

Objected to by counsel for plaintiff as a legal conclusion of the witness. Objection overruled.

Question read by stenographer.

A. The note might have been presented here in Juneau and the receipt be in Skagway or some place else. I don't see how I could offset that very well.

Q. You just thought you would sue for the money anyway. Is that it?

A. I was suing for what was coming to me.

Q. You thought that $500.00 was coming to you all right, didn't you, Martin?

A. I hold it and always have held it as a liability.

Q. A liability? A. Yes, sir.

Q. You still so consider it?

(Testimony of J. W. Martin.)

A. Well, I thought that it might turn up, yes.

Q. What do you consider that receipt you have got there, an asset or a liability?

A. Of course—I don't know what it is. It is an offset against the note, but at the same time if the note was presented for payment and an innocent party got hold of it, what would become of my part of it?

Q. That note was long overdue when this suit was brought, wasn't it, Martin? A. Yes, sir.

Q. There cannot be any such thing as an innocent purchaser of a promissory note after it was due, can there?

Objected to by counsel for plaintiff, as calling for a legal conclusion of the witness.

Q. There can be no such thing as a bona fide holder of a note transferred after maturity, can there?

The COURT.—You may answer if you know.

A. I don't know.

Mr. HELLENTHAL.—Q. Mr. Martin, I hand you a paper marked Defendants' Exhibit "G" for identification, and ask you to look at it.

A. Yes, sir.

Q. Tell us whose signature appears at the bottom of that paper? A. J. W. Martin.

Q. Is that your signature?

A. That is my signature.

Q. That is the note, Mr. Martin, that is referred to in the receipt? A. Yes, sir.

(Testimony of J. W. Martin.)

Mr. HELLENTHAL.—We now offer it in evidence, your Honor.

No objection.

Receipt marked for identification. Defendants' Exhibit "G," received in evidence.

Mr. HELLENTHAL.—Q. You never paid that note, did you, Martin? A. No, sir.

Q. The reason you didn't pay it was not because of the Farragut Bay deal, was it? Yes or no.

A. I had a receipt against the note.

Q. Answer my question, Mr. Martin. The reason, Mr. Martin, that you didn't pay this note didn't have any relation to your Farragut Bay dealings, did it? A. It did not.

Q. You are positive about that?

A. Yes, sir.

Q. Positive that this note was cancelled because there was some things down there that were worthless anyway that you didn't get?

Mr. BARNES.—We object to that as assuming a fact to exist that does not exist.

Objection overruled. Plaintiff excepts.

Mr. HELLENTHAL.—Q. Yes or no?

A. Yes, sir.

Redirect Examination.

Mr. BARNES.—Q. Now, this receipt was given as it reads—Read it there, if you please, and give the jury the date of it again.

A. December 15, 1905.

Q. Now, Mr. Martin, I would ask you if since that time that note has ever been tendered to you?

(Testimony of J. W. Martin.)

A. It has not.

Q. Tell the jury when was the first time that you have ever seen that note, since you gave it.

Objected to by counsel for defendants, as immaterial. Objection overruled.

A. To-day, or here in court at the commencement of this trial.

Q. I understood you to say, if you please, that Mr. Burford was the one who vouchsafed to you the information that these articles were missing?

A. Yes, sir.

Q. Is there any explanation that you would like to make further about that deal, or have you told all that was necessary?

A. I think I have told it all.

Recross-examination.

Q. You never went after that note, did you, Martin? A. No, sir.

Q. Never asked for it? A. No, sir.

Q. Have you been in Juneau since then?

A. Yes, sir.

Q. You knew where the note was, didn't you?

A. No, I can't say I did.

Q. You had a pretty good suspicion that it was in Caro & Company's safe?

Mr. BARNES.—To which we object. He is not giving suspicions.

Objection sustained.

Mr. HELLENTHAL.—Q. Weren't you pretty sure it was in Caro & Company's safe?

(Testimony of George C. Burford.)

Objected to by counsel for plaintiff as calling for the opinion of the witness. Objection sustained.

Q. You never went to Caro and asked him?

A. I did not.

Plaintiff rests.

[Testimony of George C. Burford, Recalled on Sur-rebuttal.]

GEORGE C. BURFORD, being recalled as a witness on sur-rebuttal, testified as follows:

Direct Examination.

Mr. HELLENTHAL.—Q. Mr. Burford, you heard Mr. Martin's testimony with reference to some things that were missing? A. Yes, sir.

Q. Did you ever make any confession to Martin?

Mr. BARNES.—We object. That was gone over by them. We were simply denying it. It was not new matter brought out.

Objection overruled. Plaintiff excepts.

Question read by stenographer.

Mr. BARNES.—There is no evidence of a confession testified to.

The COURT.—A confession of what?

Mr. HELLENTHAL.—A confession of those missing things? A. Yes.

Q. What did you tell him?

A. I told him about losing our salt at Farragut Bay, also about losing our anchors and gears in storms at Portage Bay, also about losing gear in the storm which came up later on, and also about the dories.

(Testimony of George C. Burford.)

Q. What did you tell him about the dories?

Objected to by counsel for plaintiff, as not sur-rebuttal. Objection sustained.

Mr. HELLENTHAL.—I want to show that it is true that some things were lost at Farragut Bay, but that nothing was lost and these things were all there at the time the sale was made to Martin, and that there was no liability of Burford to make good to Martin for them.

Mr. BARNES.—No, he cannot deny what is in writing, and this is not sur-rebuttal.

The COURT.—Whatever confession he may have made to Mr. Martin is admissible. Let him state what his confession was.

Mr. HELLENTHAL.—Q. What did you tell him about?

A. About losing our salt in the storm at Farragut Bay, also losing our anchors and gear at Portage Bay, and losing, or forgetting, a dory at Juneau, and the dory or seine boat laying alongside of the float at Windham Bay. We could not get it on account of its being so high up, since we had no time to get our stuff off of there on account of the tide.

Q. When were these things lost, before or after the sale?

A. These things were lost after the sale.

Q. Were they all in esse and in being after the sale was made? A. Yes, sir.

Objected to by counsel for plaintiff, as leading.

The COURT.—It is leading, and part of it is in Latin.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. Were any of these things lost or strayed or stolen at the time this sale was made to Martin?

Objected to by counsel for plaintiff, as leading. Objection overruled.

A. No, sir.

Q. What was the condition of that seine, that net when Martin came down to Petersburg?

A. One of the seines had been in the water probably once. We used it all that winter. There was another seine in good condition. There was another seine that was in poor condition.

Q. There were three seines? A. Yes, sir.

Q. What was the condition of the scow "Volunteer"?

A. The scow "Volunteer" was in fairly good shape after the storm at Windham Bay.

Q. What was her condition before the storm?

The COURT.—The only question now is the purpose for which the cancellation of this $500.00 note was given. Now the witness testifies as to certain articles missing and the condition of the various other articles; and whether they were good, bad or indifferent at the time of the sale is another question. That is not the question here at all. The question here is whether the plaintiff has truthfully stated the conditions and the reasons for the settlement.

Mr. HELLENTHAL.—Q. Now, Mr. Burford, did any one of these things, any one or more of them go to make up this settlement of this $500.00 note?

(Testimony of George C. Burford.)

Mr. BARNES.—To which we object. That was gone over on the start, what the settlement of the $500.00 note was, and in his pleadings he alleges it. Now can they come in again and ask it? It is not proper sur-rebuttal.

Question read by stenographer.

The COURT.—He has already testified what went into that.

Mr. HELLENTHAL.—Q. Where was this dory at the time this settlement was made?

The COURT.—Which dory?

Mr. HELLENTHAL.—Q. The dory that was not at Wrangell Narrows.

A. It was at Decker's Float.

The COURT.—He has testified to three dories.

WITNESS.—Two dories.

Mr. HELLENTHAL.—Q. Where were those two dories?

A. One was at Decker's float here in Juneau, and one was at Windham Bay beach alongside of the log-float.

Q. Where was the float?

A. At Windham Bay.

Q. Were there any articles in your invoice, Mr. Burford, that you have testified to as being in existence at one time that were not there at the time of the sale?

Mr. BARNES.—I object to it because it assumes a fact to exist which is not in existence; and it is attempting to prove the contents of the inventory, which the Court said could not be proved.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—This receipt refers to the original invoice, your Honor.

Objection overruled. Question read by stenographer.

Q. Except the store site, store building and cabin at Farragut Bay? A. Yes, sir.

Q. What were they?

A. Some buoy lines and a couple of skits of gear.

Q. Did you mention that to Mr. Martin?

A. I don't remember whether I did or not.

Q. What became of those articles?

A. They were in the cabin on the scow with my own things. I had some musical instruments in the cabin, but they were taken out. I had two anchors. Mr. York took the anchors, but he returned them later on to us, but the buoy lines and the two skits were never returned.

Q. How much were they worth?

Objected to by counsel for plaintiff, as immaterial. Objection sustained.

The COURT.—The question is "What were they put in for"?

Mr. HELLENTHAL.—Q. Were they put into this settlement? A. They were.

Q. What were they put in for?

Mr. BARNES.—We object to that. That was not mentioned by us at all. It is not sur-rebuttal.

The COURT.—I do not think it is sur-rebuttal. This is the first time I recall having heard about it. I sustain the objection.

(Testimony of George C. Burford.)

Mr. HELLENTHAL.—Q. Mr. Burford, when did you first recall that there were certain articles missing besides the Farragut Bay store site and store building?

Objected to by counsel for plaintiff, as immaterial.

The COURT.—He has been called upon before to make these statements and testify to this matter. I will sustain the objection.

Defendants except.

Mr. HELLENTHAL.—Q. When you testified here yesterday about this matter, did you have that matter in mind?

Mr. BARNES.—To which we object, as it is self-evident that he did not, or he would have testified to it this morning. We asked him the question. We object to the question as not in sur-rebuttal.

Objection sustained. Defendants except.

Cross-examination.

Mr. BARNES.—Q. I asked you this morning a time or two if you had not detailed all the statements between—

The COURT.—Now you are going into the very same thing that I have ruled out.

Mr. HELLENTHAL.—I don't object, your Honor.

Mr. BARNES.—He testified to certain things and those are the only things I am going to ask about.

The COURT.—Ask the question.

Mr. BARNES.—I asked you this morning if you had not testified to everything that had transpired there between you and Mr. Martin, didn't I?

(Testimony of George C. Burford.)

A. You did.

Q. And you said you had? A. Yes, sir.

Q. Who have you talked to since then?

A. I told you I didn't remember.

Q. To whom have you talked about this case since you went off of the stand this morning about your testimony? A. Mr. Hellenthal.

Q. You and Mr. Hellenthal went over it and then you found that other testimony, didn't you?

The COURT.—What testimony?

Mr. BARNES.—That he has testified to this afternoon different from what he testified to when he was first on the stand.

The COURT.—Find out what the questions are.

Mr. BARNES.—I will have to ask the reporter to read them, because they are not all in my mind. One was—he testified that he told Mr. Martin that there was some anchors missing.

The COURT.—I know. And that is the very thing I have excluded the testimony about. That is the very thing Mr. Hellenthal has been trying to get in here.

Mr. BARNES.—Q. This settlement that you now have been testifying about was made over four months after the sale was made, wasn't it?

A. I don't remember when the settlement was made.

Q. Would the date be any refreshment of your memory? (Shows witness paper.)

A. Whatever the date is there.

[Testimony of Jules B. Caro, Recalled on Sur-rebuttal.]

JULES B. CARO, being recalled, on sur-rebuttal, testified as follows:

Direct Examination.

Mr. HELLENTHAL.—Q. Mr. Caro, in a conversation held in your office building in Juneau, during the early part of December or the latter part of November in the year 1906, between you and Mr. Martin, you and he alone being present, did he state to you that unless you paid him $1200.00, he would have George Burford indicted by the grand jury, of which he was a member? A. Yes.

Cross-examination.

Mr. BARNES.—Q. Wasn't this what was said at that time and place, nobody being present but you and Mr. Martin: Didn't you go to him and ask why he had commenced the suit, and ask him to wait and that Caro & Co. would get Burford over and make him fix the matter up? A. I never did.

Q. Nothing of that kind at all?

A. No, sir.

Q. You are absolutely certain on that point?

A. That I went to him? I am certain that I never did.

Q. If you didn't go to him, he might have come to you, but you came together at the time you referred to now, the only time that you had a talk about the case at all, and you said to him, asked him why he had commenced a suit, and asked him to wait and

(Testimony of J. B. Caro.)

you would get Burford over, that Caro & Co. would get Burford over and make him fix the matter up, and wasn't that suit delayed a term of court on that account? A. No, sir.

Q. No such statement as that was made by you?

A. No, sir.

Q. Did this conversation take place: Martin and Mr. Caro, the only time they ever had a conversation about the case and the time he refers to, that instead of the conversation that he refers to the conversation was, Caro asked Martin why he had commenced the suit, and for Martin to wait and he would get Burford over and make him fix the matter up, or words to that effect? Did that conversation take place at the time you refer to, the only time you saw him about this case, no one being present but you and he?

A. It did not.

Q. Now, don't you know, Mr. Caro, that this suit was postponed on that account alone, the first postponement that was had? A. I do not.

Defendants rest.

[Testimony of J. W. Martin, Recalled.]

J. W. MARTIN, being recalled, testified as follows:

Mr. BARNES.—Q. Mr. Martin, I will ask you, at the time Mr. Caro referred to just now on the stand, the only time that you and he talked about the case, you and he being alone there at his office, if in substance the following conversation was had: Caro asked you why you had commenced the suit,

(Testimony of J. W. Martin.)

and asked you to wait and they would get Burford over and make him fix the matter up, or words in substance to that effect? Was that statement made in that conversation by you with Mr. Caro?

A. Yes, sir, it was.

Q. Now, I would ask you what you did in pursuance of that statement made by him in having your counsel put the case off?

Objected to by counsel for defendants as immaterial.

The COURT.—The impeaching question is answered and that is the end of it.

Plaintiff excepts.

Plaintiff rests.

Defendants rest.

[Motion of Defendant for Verdict, etc.].

Mr. HELLENTHAL.—Come now the defendants, and each one of them, and move the Court to direct a verdict for the defendants and each of them, for the reasons: first, that there is no evidence to show that any false representations such as can found the basis of an action for deceit were made by the defendants, or either of them, to the plaintiff in connection with the transaction referred to in the evidence and the pleadings; second, for the reason that all the representations made and relied on in this case are either mere statements of conclusions of law or opinions of the defendants, and that no false representations of fact were made in connection with the sale of the property referred to in the evidence and pleadings, by the defendants or either of them, to

the plaintiff; third, that it conclusively appears from the evidence that the plaintiff made no inquiry whatsoever as to the truth or falsity of statements made to him, and that the damage accruing to him, if any, was the result of his own folly and lack of diligence; fourth, that there is no evidence in the record upon which the jury can base a verdict of damages, there being no proof of the value of the property claimed not to have been delivered at the time of the sale, the measure of damages being the value of the property sold and delivered at the time of the delivery, with legal interest.

Motion denied.

Defendants except.

[Reporter's Certificate to Transcript of Evidence.]

I, Harold M. Lull, Official Reporter of the District Court for the District of Alaska, Division No. 1, do hereby certify that the foregoing 216 typewritten pages constitute a full, true and correct transcript of the evidence in Cause No. 572-A in the above-named court, entitled J. W. Martin, Plaintiff, vs. George C. Burford et al., Defendants.

HAROLD M. LULL,
Official Court Reporter.

[Same Court—Same Cause.]

Charge to the Jury.

Gentlemen of the Jury:

In this action the plaintiff, J. W. Martin, seeks to recover from the defendants both compensatory and exemplary damages, which he asserts resulted to

him by reason of certain alleged false and fraudulent representations willfully and wantonly made by the defendants in a certain instrument in writing. As this instrument is set forth in full in the complaint, and as you are to take the pleadings to your jury-room with you, it is unnecessary to do more than to call it to your attention at this time. It is alleged by plaintiff that the representations there contained, i. e., that the defendants "are the owners and entitled to sell the said one-third interest" in "one store building and site situated at Farragut Bay, Alaska," was falsely and wantonly made by the defendants to the plaintiff in order to induce him to make the payment of $2,000.00, which he did make. He further alleges that at no time was the title to said building and site at Farragut Bay in the defendants collectively, or in either of them, and that they, nor either of them were ever either the owners or in possession of the property, and that at no time were they, or any of them, entitled to sell it; that the representations as to said ownership and right to sell were false and were known by the defendants when made to be false, and were made with the intent to, and did, deceive the plaintiff. Plaintiff further alleges that he was at the time wholly ignorant of the truth or falsity of the representations, but that he believed them to be true, and would not have paid the said sum or any part of it but for his belief in the truth of the statements, and that he had no means of learning whether or not the statements and representations were true or false.

The answer of one of the defendants, J. B. Caro, is accepted as the answer of all of the defendants

by stipulation of counsel. Defendants in their answer generally deny the allegations as to false and fraudulent representations; as to the plaintiff being deceived, or that he paid the sum of money that he asserts that he paid, or that he was damaged in any sum whatever, but allege the fact to be that at the time of the transaction in question the defendant George Burford was the owner of a certain fishing outfit, which is described in a certain instrument which the plaintiff denominates as a receipt, and which defendants describe as a bill of sale; that at that time, Burford also had an option upon a certain store building and site at Farragut Bay, that the defendant Burford sold Martin a one-third interest in the fishing outfit, for which the plaintiff agreed to pay the sum of $2,000.00, and that at that time the said Burford fully stated to the plaintiff the fact that he held an option upon said property and all the details in connection therewith, and agreed to exercise and take up the said option and to thereupon convey a one-third interest to said property to the plaintiff Martin as a part of the said outfit so purchased; that upon the exercise by Burford of the right of purchase, under the option, plaintiff should become the owner of a one-third interest in said store building and site; and that Burford in no way concealed any of the facts from the plaintiff, and that the bill of sale was entered into upon a full and fair understanding of all the fact in connection therewith. Defendants further allege that the firm of J. B. Caro & Company, which consists of Hooker and Caro, were at one time inter-

ested in the co-partnership business known as the Arctic Fishing and Packing Co., and that the said Hooker executed the said bill of sale for the firm merely to convey to the plaintiff whatever interest the firm might still have in the outfit so conveyed by reason of their former interest and ownership in the said Arctic Fishing and Packing Co., and that the plaintiff was informed of all these facts at the time of the execution of the bill of sale. Defendants further allege that the plaintiff Martin agreed to pay for the one-third interest in said outfit, store building, site, etc., the sum of $2,000.00 to the said Burford; that only a small portion of the said sum was paid in cash and the balance in notes of hand; that because of the inaccessibility of Farragut Bay to the steamship companies, and because said steamship companies would not allow their ships to call at said point, it became impossible to carry on the fishing business at Farragut Bay, and that a short time after this fact became known to the parties, plaintiff and defendant, Burford entered by parol into a new and different agreement and settlement concerning their several interests in said outfit; that it was agreed that the Farragut Bay project should be abandoned, and that the business should be continued in Wrangell Narrows; that plaintiff should hold his one-third interest in the fishing outfit, with the exception of the said store building and site; that said store building and site was and has been valued by plaintiff and defendant to be of no greater worth or value than the sum of $250.00; that Burford should not exercise his option to purchase said build-

ing, and that the plaintiff should be relieved from the payment of a certain promissory note of $500.00, one of those given as a part of the original purchase price, and that it should be cancelled and surrendered to the plaintiff; that said note had never been presented by the defendant; that the defendant Burford was ready and willing to surrender the said note to the plaintiff, and had not done to theretofore because of the fact that the said note had been left in Juneau and was not accessible at the time of the cancellation. All of these allegations the plaintiff denies in his reply.

At the commencement of this trial, the defendant Burford tendered the plaintiff in open court the said note, $500.00, in conformity with the said alleged agreement.

1.

You are instructed that you are the judges of the credibility of the witnesses and the weight to be attached to the testimony of each. You will observe their demeanor on the stand, their fairness or lack of fairness, their candor or lack of candor, their interest or lack of interest in the result of the litigation, their means and opportunity of knowing the things whereof they testify, and their disposition to tell the truth concerning the same.

2.

If you believe from the evidence that any witness has sworn falsely on any material fact or thing in this case, you are at liberty to disregard that particular part believed to be false, or the entire testimony of the witness, as you deem proper.

3.

Gentlemen of the jury, you are instructed that your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds. In civil cases the affirmative of the issue must be proven, and when the evidence is contradictory, the finding must be in accordance with the preponderance of the evidence. Evidence is to estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, and therefore if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party to present, the evidence offered should be viewed with distrust.

4.

You are instructed that the preponderance of evidence in the case is not alone determined by the number of witnesses testifying to a fact or set of facts. In determining on which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or the improbability of the truth of

their several statements in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances, it is for you to determine upon which side is the greater weight, that is, the preponderance of the evidence.

5.

You are further instructed that it is your duty to consider carefully all the testimony in this case bearing upon the issues of fact submitted to you, and, if possible, to reconcile any and all conflicting statements of the witnesses; and if you find it practicable to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses, it will be your duty to adopt that theory rather than one that will require you to reject any of the testimony as intentionally false.

6.

You are instructed that it is not proper for counsel in the argument of a case, or at any time during the trial, to state any matter or things bearing upon a question of fact, and claimed to be within their own personal knowledge, or which may have been stated to him by others not witnesses in the case.

And you are further instructed to disregard all such statements, if any have been made, and to make up your verdict on the evidence actually given in the case, without placing any reliance upon, or giving any credit to, any statements of counsel not supported by the evidence introduced.

In determining any of the questions of fact presented in this case, you should be governed solely by the evidence introduced before you.

7.

You are instructed that you are to consider only such evidence as is admitted by the Court. Any evidence that has been ordered by the Court to be stricken must be disregarded by you in your investigation of the case, and such evidence is as though it had never been admitted, and is no part of the case.

8.

You are further instructed, gentlemen, that this is an action of deceit, and that there are five essentials of which you must be satisfied by a preponderance of the evidence before you can return a verdict for the plaintiff. These essentials are:

First, that false and fraudulent representations have been made to the plaintiff, and that the representations were material;

Second, that the defendants knew when they made the representations that they were false and fraudulent;

Third, that they were made with the intent to deceive the plaintiff and to induce him to act thereon;

Fourth, that he believed said representations to be true, and acted thereon; and

Fifth, that he was actually damaged thereby.

9.

You are instructed that if one person represents to another as true that which the person making the representation knows to be false, and further, if the representations so made are made in such a way and under such circumstances as to induce a reasonable man to believe the matter stated is true, and if such representation is meant to be acted upon and the per-

son to whom it is made believes it and acts upon the faith of it, suffering damage thereby, such false representation so made and with such consequences constitute fraud sufficient to sustain an action for deceit, and it is for you to determine from a preponderance of the evidence in this case if there is any such fraud in this case.

Defendants except on the ground that it does not state the law in this; that unless the false representation was such a representation as in as peculiarly within the knowledge of the party making the same or the party making the same used some trick or artifice, or did something to prevent the party to whom the representation is made from making an investigation in regard to the truth thereof, it is the duty of the party to whom the representation is made to investigate for himself before relying upon the representation so far as means of investigation are at hand. Exception allowed.—R. A. G.

10.

You are further instructed that, while it is true that the burden of proving the fraud is upon the party alleging it, yet in a civil action like this the party alleging the fraud is not bound to prove it beyond a reasonable doubt. It is sufficient if in your minds the fact of fraud is established by the greater weight of the evidence. If, after a consideration of all the facts and circumstances proved, you believe that the defendants were guilty of fraud as charged in the complaint, and that the plaintiff has sustained damage because thereof, then, and only then, should you return a verdict for the plaintiff.

11.

You are instructed that if the plaintiff was aware that the representations alleged to have been made to him were false, or if the representations and surrounding circumstances were such as ought to have aroused suspicion as to their truth in the mind of a person of ordinary business care and caution, then he cannot recover unless he exercised ordinary diligence in endeavoring to ascertain whether or not the representations were true or false; and if you find that the suspicions of an ordinarily prudent and careful business man would have been aroused thereby, and that plaintiff did not exercise such diligence, he cannot recover. And, before you can return a verdict for the plaintiff in this cause, you must be satisfied by a preponderance of the testimony as defined in these instructions, not only that the representations were of the character and made in the manner and with the intent as alleged, but that they were also made under such circumstances, and the conditions surrounding the transaction were such as to deceive a person acting with reasonable care and ordinary prudence and caution; and in determining this question, you should consider all the circumstances under which the alleged representations appear from the evidence to have been made, and whether under such circumstances the representations were such as a person of common and ordinary prudence would, or should, have relied upon, or such as would be likely to deceive such a person.

Plaintiffs except as not within doctrine in 62 Fed. 723.

Defendants except because it is not enough that the representations were such as would deceive a man of ordinary prudence, or that they were such that a man of ordinary prudence would rely upon them, in addition it is necessary that the party to whom the statements were made used reasonable efforts to ascertain the truth of the same before acting on them; on the further ground that party relying on statements must investigate regardless of the questions of fact were made as to arouse his suspicion. Exception allowed.—R. A. G.

12.

There are really two questions in this cause for you to determine.

The first is as to whether false representations were made with the results as alleged by the plaintiff.

And the second, did the plaintiff and these defendants thereafter make a settlement or new agreement which covered the matter included in the transaction upon which the plaintiff brings this action?

Even though you should be satisfied from a preponderance of the testimony that the allegation of the plaintiff's complaint are true, you must find for the defendants if you are further satisfied, from a preponderance of the testimony, that the differences in this action between the parties were settled, as asserted by the defendants.

13.

You are instructed that, in an action of this character, if you shall find for the plaintiff, under the

evidence and the last instruction, and if you shall further be satisfied by a preponderance of the testimony that the plaintiff sustained actual damage, and that the representations of the defendants from which such damage resulted were made willfully and wantonly, then in assessing damages you are not limited to mere compensation for such damage as you may find had been caused to plaintiff; but you may return a verdict for such further sum, by way of exemplary or punitive damages, which you may deem to be proper and adequate as a punishment to defendants for their acts. In assessing the amount of the exemplary damages, if you are satisfied from the evidence that any should be assessed, you will take into consideration the nature of the transaction in the cause, as well as the financial ability of the defendants, besides all the other evidence and circumstances in the case. If you do assess exemplary damages, you will state the amount which you find separate from any other finding you may make.

Defendants except because there is no evidence to warrant the giving of this instruction, there being no evidence in the case that the defendants acted maliciously and in wanton disregard of the rights of plaintiff, and no other evidence to sustain a verdict for exemplary or punitive damages; further excepted to because to make representations willfully and wantonly is not sufficient to warrant exemplary damages, they must be made in wanton disregard of the rights of plaintiff. Exception allowed.—R. A. G.

14.

You are instructed that, before you can return a verdict for the plaintiff, you must find that the plaintiff was a victim of fraudulent representations and has been actually, i. e., pecuniarily damaged. If you shall so find, the measure of his recovery is the amount of his loss occasioned by the fraud, but the recovery is limited to the actual loss sustained by reason of the fraud, and it is for you to determine, from all the evidence in the case, what that loss was, if anything.

Defendants except because indefinite; and, further because it does not state the true rule as to the measure of damages. The measure of damages being the market value of the property not delivered at the time of the sale, together with legal interest on the same. Exception allowed.—R. A. G.

15.

You are further instructed that, if you believe from a preponderance of the testimony in the case that at the time plaintiff accepted the instrument containing the representation that defendants "are the owners and entitled to sell the said one-third interest in one store building and site situate at Farragut Bay, Alaska," and paid the consideration therein named, he knew, or had reason to believe, from the statements of the defendants, or either of them, that such representation was not true, he cannot recover in this action, even though he may have acted upon the representation in the instrument.

16.

As a general rule, if a vendor of property, in or-

der to induce a sale, makes a positive assertion as to any fact which is peculiarly within his knowledge, and of which the purchaser is ignorant, such as the title * * * , the statement may be relied on by the purchaser without further investigation, and if the statements are false and fraudulent, and cause damage to the purchaser, he may hold the vendor liable for damages.

Defendants except, because the question of title is not a fact shown in the case to be peculiarly within the knowledge of the vendors, or either of them; nor is this true as a general proposition. The part objected to is "such as the title." Exception allowed.—R. A. G.

17.

Wantonness, as authorizing exemplary damages, does not mean necessarily malice, but a reckless disregard of the rights of others. Defendants except because there is no evidence on which to base this instruction. Exception allowed.—R. A. G.

20.

I instruct you further, gentlemen of the jury, that if you find from a preponderance of the evidence, under these instructions, that the defendant Burford made his settlement with the plaintiff under the terms of which the said Burford agreed to relieve the plaintiff from liability on a certain $500.00 note referred to in the evidence, the plaintiff agreeing, in consideration thereof, to release the defendants from liability by reason of their failure to deliver to the plaintiff title and right to the site and store building at Farragut Bay, then I instruct you, gentlemen of the jury, to find for the defendants.

21.

I instruct you, gentlemen of the jury, that a bare, naked statement made by the defendants, if you believe from the evidence that they made such statement, that they were the owners of the store building and site at Farragut Bay, and entitled to sell the same, if unaccompanied by any other statements of fact bearing upon their title or right to sell the same, or made no other representations from which the plaintiff was induced to believe in such ownership or right to sell, is not such a statement as can form the basis of an action.

Plaintiff excepts. Exception allowed.—R. A. G.

22.

I instruct you, gentlemen of the jury, that if you find from the evidence in this case that the defendant Burford told the plaintiff that he had an option on the store building and site at Farragut Bay and did not represent himself that he was the owner thereof prior to the time that the bill of sale offered in evidence was executed, then I instruct you that it is immaterial that the bill of sale offered in evidence provides that the defendants were the owners of and entitled to sell said store building and site, and you should find for the defendants. Plaintiff excepts. Exception allowed.—R. A. G.

I instruct you, gentlemen of the jury, that the statement made in a certain letter, Plaintiff's Exhibit No. 3, offered in evidence, written by the defendant J. B. Caro & Co., to the plaintiff at Haines, with reference to the mercantile business at Farragut Bay, is a mere expression of opinion and not

such a false representation as, standing alone, can form a basis of an action for deceit.

Plaintiff excepts on the ground that instruction not justified by pleadings or evidence. Exception allowed.—R. A. G.

Form No. 680. No. 572-A. In the District Court of the United States for the First Div. of the District of Alaska. Div. No. One. J. W. Martin vs. Geo. C. Burford et al. Instructions to the jury. Filed Feb. 28, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy.

[Same Court—Same Cause.]

Instructions [Requested by Plaintiff.]

The false representations were contained in a written instrument as follows:

Gentlemen of the Jury:

The Court instructs you as follows:

1.

This is an action for alleged deceit of the plff. by the defendants on account of representations made by defts. The gist of this action is fraudulently producing a false impression on the mind of the plff. Stewart vs. Wyoming Cattle Ranch Co., 128 U. S. 383. (17).

Know all men by these presents,—We, Geo. C. Burford and J. B. Caro and Company of the town of Juneau, District of Alaska, for and in consideration of the sum of two thousand dollars ($2,000.00) to us in hand paid, receipt whereof is hereby acknowledged do hereby sell, transfer and assign into J. W.

Martin of the town of Haines, Alaska, one-third (1/3) interest in and to the following described property, to wit, among other things, one store building and site situated at Farragut Bay, Alaska, and the said parties of the first part hereby covenants that they are the owners and entitled to sell the said one-third interest of all the above described property, which said property is known as the Arctic Fishing and Packing Company and set over the same to the said second party. In testimony whereof we have hereunto set our hands and seals this 28th day of August, A. D. 1905.

GEO. C. BURFORD, [Seal]
J. B. CARO & Co., [Seal]
By CHAS. E. HOOKER,
J. B. CARO.

Signed, sealed and delivered in presence of:
C. A. MacGREGOR,
L. B. FRANCES.

2.

Plaintiff alleges that in order to induce plff. to make said payment, the defts. and each of them wantonly and falsely represented in said writing to plff. that they owned the store building and were entitled to sell the same, and that the whole of said statement was false and was acted on by plff. in the belief of its truth, and at the time of its being made it was known by the defts. and each of them to be false, and was made by the defts. and each of them with intent to deceive plff., and plff. thereby suffered injury, to wit, in the loss of his said $2,000, and so that the same could be wrongfully acquired

by these defts., and that plff. at the time was wholly ignorant of the truth or falsity of the said statement, but believed the same to be true, and at the time plff. had no means of learning the truth or falsity of said statements and would not have paid said sum of $2,000 or any part thereof had it not been for his belief in the truth of said statement, and that defts. of either of them never at any time ever had any title or ownership or were they ever in possession of said store building or site, nor were they or either of them ever entitled to sell the same, nor had they at the time of the commencement of this action such title or were they entitled to sell the same, and that by said false and fraudulent statements of defts., plff. has been damaged in the sum of $2,000, and plff. claims exemplary damages in the sum of $1,000. Refused R. A. G. Exception allowed.

3.

I charge you that if you believe from a preponderance of the evidence that the above facts have been proven, then it is your duty to find for the plff. Refused R. A. G. Exception allowed.

4.

I charge you the law is, if a fact is represented by a party and that fact is susceptible of accurate knowledge and the speaker is or may be well presumed to be cognizant thereof while the other party is ignorant and the statement is a positive statement containing nothing improbable or unreasonable as to put the other party upon further inquiry or give him (20 Cyc., p. 33) cause to suspect it is false, and an investigation would be necessary for him to dis-

cover the truth, the statement may be relied on; hence I charge you that the fact of defts. ownership of the building and site at Farragut Bay was a fact susceptible of accurate knowledge, and the defts. well knew whether or no they were such owners, and there was nothing improbable or unreasonable in the statement, and if you believe from a preponderance of the testimony that an investigation would have been necessary for plffs. to learn the truth or falsity of said statement, then I charge you plff. was entitled to rely on the said statement. Refused R. A. G. Exception allowed.

5.

The fact of the ownership of said store and site by the defts. is a natural fact and it was made with knowledge of its falsity and as a positive assertion; hence I charge you the law is a fraudulent intent on the part of defts. as inferred in its making. Refused R. A. G. Exception allowed. 20 Cyc. 37.

6.

The nearness of the signing of said bill of warranty by the defts. and the payment of said money by the plff. is a fact to be considered by you in determining whether the misrepresentations were relied on by the plff.; hence I charge you that if the signing of said agreement by the defts. was followed immediately by the payment of the money by plff., then the law is plff. relied on said statements. Refused R. A. G. Exception allowed. 20 Cyc. 42.

7.

Where parties are not in possession of land and have neither color or claim of title under any in-

strument purporting to convey the premises or any judgment establishing their rights to them and make false and fraudulent representations as to the title, the purchaser acting on those false and fraudulent misrepresentations may maintain an action. Andrus vs. St. Louis Smelting and Refining Co., 130 U. S. 643. Refused R. A. G. Exception allowed.

7½.

As a general rule, if a vendor of property, in order to induce a sale, makes a positive assertion as to any material fact which is peculiarly within his knowledge, and of which the purchaser is ignorant, such as the title * * * the statement may be relied on by the purchaser without further investigation; and if the statements are false and fraudulent and cause damage to the purchaser, he may hold the vendor liable for damages. Charged R. A. G. Idem, supra.

7¾.

Where a vendor in a sale or exchange of real or personal property makes false representations as to material facts relating to the property, having at the time knowledge that his statements are false or what the law regards as equivalent to such knowledge, and intending that the purchaser shall rely upon them as an inducement to the purchase, he becomes liable in an action of deceit in case the purchaser, acting in reliance upon the representations, consummates the purchase and suffers loss thereby. Refused R. A. G. Exception allowed. 20 Cyc. 46.

8.

The plff. in this action asks for exemplary dam-

ages. In a proper case a party has as much right to exemplary damages as he has to compensatory damages, and it is as much a jury's duty to award, in such a case, exemplary damages as compensatory damages.

Compensatory damages are damages in compensation of the loss suffered. "Exemplary damages may be awarded in all actions of tort, in addition to the sum awarded by way of compensation for the plaintiff's injury, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the deft. is required in order to charge him with exemplary damages." Lakeshore etc. R. Co. vs. Prentice, 147 U. S. 101-107; Scott vs. Donald, 165 U. S. 58-87. Refused. Exception allowed.

9.

"Wantonness as authorizing exemplary damages does not mean necessarily malice, but a reckless disregard of the rights of others." Charged R. A. G. Western Union Co. v. Lawson, 72 Pac. 283-4.

10.

If you believe from a preponderance of the evidence that the defendants in making the statement in writing to plff. that they were the owners of and entitled to sell a one-third interest of one store building and site at Farragut Bay, Alaska, had a reckless disregard of the rights of plff., then it is your duty to include in your verdict, in addition to the amount to reimburse plff. for his actual loss, such sum by way of exemplary damages as, in your

judgment, may serve as a protection to society against the violation of personal rights, provided you also find from a preponderance of the evidence that said statement was false, and made to induce plff. to pay said sum, and was acted on by plff. in the belief of its truth, and at the time of making it was known by said defts. and each of them to be false, and was made by said defts. and each of them with intent to deceive plff., and plff. thereby suffered injury, to wit, the loss of his $2,000, and so that the same could be wrongfully acquired by defts. and that plff. was wholly ignorant of the truth or falsity of said writing; but believed it to be true, and at the time plff. had no means of learning the truth or falsity of said statement, and that plff. would not have paid the said sum of $2,000, or any part thereof, but for his belief in the truth of said statement. Refused R. A. G. Exception allowed.

XI.

Plff. alleges that in order to induce him to make the payment of $2,000, defts. wantonly and falsely represented in said writing that they owned the store building and site named therein, and that he would not have paid said sum or any part thereof but for said statement in writing; other articles are named in said writing, but no value has been placed on them by either plff. or defts.; hence those articles are valueless. The only property in said writing that has a value is the building and site which defts. allege is of no greater value than $250; this fact may be taken into consideration by you in deciding whether or no the allegation "that but for said state-

ment in writing plff. would not have paid said sum of $2,000 or any part thereof," you may consider whether or no plff. as a reasonable man, would have paid said sum of $2,000, or any part thereof, for property which had no value. Refused R. A. G. Exception allowed.

23-A.

In action of this kind the law infers an improper motive, if what the defts. said was false, within their knowledge, and occasion damage to the plff. Refused R. A. G.

In case you find that the plff. is entitled to recover, then I charge you he is entitled to be placed in the same position he was before the transaction complained of took place, and that the value of the Farragut Bay property is not the sole damage which plff. is entitled to recover. Refused R. A. G. Exception allowed.

The defendants set up a settlement between them and the plff.; before you find for the defendants you must find by a preponderance of the evidence that the settlement mentioned and evidenced by the receipt against the $500 note introduced in evidence was a settlement of the demand plff. urges against defts. on account of the transaction concerning the Farragut Bay property; and was not a settlement for articles missing from the inventory, provided you also find the plff. was misled by the written statement complained of. Refused. Exception allowed.

No. 572-A. Dist. Court, Dist. of Alaska, Div. No. 1, Juneau. J. W. Martin vs. J. B. Caro, et al. In-

structions Asked for by Plff. Filed Feb. 28, 1908. C. C. Page, Clerk. By R. E. Robertson, Asst.

[Order Settling and Allowing Bill of Exceptions, etc.]

I, Royal A. Gunnison, Judge of the District Court for the District of Alaska, Division No. 1, being the Judge who presided at the trial of the within entitled cause, and being the Judge who rendered the judgment herein, do hereby certify that the within and foregoing bill of exceptions was duly presented to me for signature by the counsel for plaintiff, and for settlement and certification, within the time, and in the manner prescribed by the rules and practice of this court, and having examined the same and found it to be true and correct, I do now, within said time, allow and settle and certify the same, and order the same to be filed and to become a part of the record herein, as a true and correct bill of exceptions. And I do further certify that said bill of exceptions contains the evidence and all the evidence received by me at the trial or otherwise, or offered by either party to the cause at the trial, or otherwise, and my rulings thereon, and all matters and things of which I took notice or judicial knowledge of and all the proceedings in said cause in the order of their occurrence, which could or did concern, relate to or affect any of the questions arising at the trial thereof, and all the instructions to the jury given or offered at said trial.

I found, as facts from the evidence, that the originals of all the exhibits, of both plff. and defts., had

been filed with or issued by, as the case may be, the officer with whom or by whom they purport in the certificates of copies attached thereto, as set out in said bill of exceptions, to have been filed with or issued by, respectively. Witness my hand and the seal of this Court this 13th day of March, 1909.

ROYAL A. GUNNISON,
Judge of the District Court for the District of Alaska.

[Same Court—Same Cause.]

Petition for Writ of Error.

J. W. Martin, plff. in the above-entitled cause, feeling himself aggrieved by the judgment rendered and entered on March 23, 1908, comes now by his attorney, E. M. Barnes, and files and presents his assignment of errors, and petitions said Court for an order allowing said plff. to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plff. shall give and furnish upon said writ of error.

And your petitioner will ever pray.

E. M. BARNES,
Atty. for Plff.

572-A. J. W. Martin vs. Geo. C. Burford et al. Petition for Writ of Error. Filed Mar. 18, 1909. C. C. Page, Clerk. By A. W. Fox, Deputy.

[Same Court—Same Cause.]

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to the Honorable ROYAL A. GUNNISON, Judge of the District Court, for the District of Alaska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between J. W. Martin, plff. and Jules B. Caro, Geo. C. Burford, Chas. E. Hooker & J. B. Caro, partners doing business under the firm name of J. B. Caro & Co., defts., manifest errors have happened to the great prejudice and damage of the said plff., as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Court of Appeals, for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same, at the said place in said circuit on or before

thirty days from this date, that the records and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 18 day of March, 1909.

Attest my hand and the seal of the District Court for the District of Alaska, at the clerk's office at Juneau, Alaska, on the day and year last above written.

[Seal] C. C. PAGE,
Clerk for the District of Alaska, Div. No. 1 at Juneau.

By A. W. Fox,
Deputy.

Allowed this 18th day of March, 1909.

Supersedeas bond fixed at $500.00 to be approved by C. C. Page, Clerk of this Court.

ROYAL A. GUNNISON,
Judge of the District Court, for the District of Alaska, Div. No. 1, at Juneau.

[Endorsed]: 572-A. J. W. Martin vs. Geo. C. Burford et al. Writ of Error. Filed Mar. 18, 1909. C. C. Page, Clerk. By A. W. Fox, Deputy.

[Same Court—Same Cause.]

Bond on Writ of Error.

Know All Men by These Presents: That we, J. W. Martin, plff. in the above-entitled cause, as principal, and H. Fay and G. A. Baldwin, as sureties, are jointly and severally held and firmly bound unto the above-named Jules B. Caro, Geo. C. Burford, Chas. E. Hooker and J. B. Caro, partners doing business under the firm name and style of J. B. Caro and Co. in the sum of $500, lawful money of the United States of America, to be paid to the said Jules B. Caro, Geo. C. Burford, Chas. E. Hooker and J. B. Caro, partners doing business under the firm name and style of J. B. Caro and Co., their heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators jointly and severally, firmly by these presents.

Signed and sealed by us and dated this 18th day of March, 1909.

The condition of the above obligation is such that whereas said plff. is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a judgment rendered and entered by the District Court for the District of Alaska, Div. No. 1, which judgment was made and entered in the above entitled cause on the 23d day of March, 1908.

Now, therefore, the condition of the above obligation is such that if the above-named plff. shall pros-

ecute said Writ of Error to effect and answer all damages and costs of appeal, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

J. W. MARTIN.
H. FAY.
G. A. BALDWIN.

In presence of:
W. H. REYNOLDS,
W. B. STOUT.

United States of America,
District of Alaska,—ss.

This is to certify that on the 18th day of March, 1909, before me, personally appeared J. W. Martin and H. Fay, and G. A. Baldwin, to me known to be the identical persons who executed the foregoing bond, and each severally acknowledged that he executed the same freely and voluntarily.

[Seal] W. B. STOUT,
Notary Public in and for Alaska.

United States of America,
District of Alaska,—ss.

H. Fay and G. A. Baldwin, each being first duly sworn, on his oath says: I am one of the sureties in the above and foregoing bond; I am a citizen of the United States and a resident of Alaska; I am not an attorney or counselor at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the sum of $500 over and above all of my just debts and liabilities in property situated within the District of

Alaska and exclusive of property exempt from execution.

H. FAY.
G. A. BALDWIN.

Subscribed and sworn to before me this 18 day of March, 1909.

[Seal] W. B. STOUT,
Notary Public in and for Alaska.

The above bond being correct in form and sufficient in amount, and the sureties being sufficient, is approved this 22d day of March, 1909.

[Seal] C. C. PAGE,
Clerk.

No. 572-A. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro et al., Defendant. Bond on Writ of Error. Filed Mar. 22, 1909. C. C. Page, Clerk. By ————, Deputy. E. M. Barnes, Attorney for Plff. Offices: Rooms 7-8 Lewis Block, Juneau, Alaska.

[Same Court—Same Cause.]

Citation [on Writ of Error—Original].

United States of America,—ss.

The President of the United States, to Geo. C. Burford, Jules B. Caro, Chas. E. Hooker & J. B. Caro, Partners Doing Business Under Firm Name and Style of J. B. Caro & Co., and J. A. Hellenthal, Their Attorney.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the District of Alaska, Division No. 1 at Juneau, in the case, wherein J. W. Martin is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 18 day of March, A. D 1909, and of the Independence of the United States the One Hundred and Thirty-third.

ROYAL A. GUNNISON,
District Judge.

[Seal] Attest: C. C. PAGE,
Clerk.

By A. W. Fox,
Deputy.

[Endorsed]: 572-A. J. W. Martin vs. Jules B. Caro et al. Citation. Filed Mar. 18, 1909. C. C. Page, Clerk. By A. W. Fox, Deputy.

[Same Court—Same Cause.]

Affidavit of Service [of Citation on Writ of Error].

United States of America,
District of Alaska,—ss.

I, E. M. Barnes, being first duly sworn, depose and say: That the inception of this action I have been at all times and now am attorney for plaintiff herein..

That since about July, 1909, defts. counsel, J. A. Hellenthal, Esq., has been absent from the city of Juneau, where his office is, and said office has been locked at all said times and no one was in charge thereof, so far as affiant knows.

That no substitution of attorneys has ever been made in this case to my knowledge. That on the 18th day of March, 1909, I served the Citation and Writ of Error herein on the defts., by depositing a copy of the same in the U. S. Postoffice at Juneau, Alaska, postage prepaid, addressed to J. B. Caro & Co., Juneau, Alaska, that being their postoffice address. That said Geo. C. Burford is not a resident of Juneau, Alaska.

I endeavored to make a personal service but found their place of business locked and no one seemingly in charge thereof or present therein.

E. M. BARNES.

Subscribed and sworn to before me this 3d day of April, 1909.

[Seal] A. W. Fox,
Deputy Clerk of District Court, Dist. of Alaska, Division No. 1.

[Endorsed]: No. 572-A. In the District Court for Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro et al., Defendants. Aff. of Service. Filed Apr. 3, 1909. C. C. Page, Clerk. By A. W. Fox, Deputy. E. M. Barnes, Attorney for Plff. Offices: 7-8 Lewis Block, Juneau, Alaska.

[Clerk's] Certificate [to Transcript of Record.]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, C. C. Page, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 294 pages of typewritten matter, numbered from 1 to 294, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record on writ of error, as requested in the praecipe of the plaintiff in error, said praecipe being filed herein and made a part hereof, in cause No. 572-A, wherein J. W. Martin is plaintiff in error and George C. Burford et al., are defendants in error.

I further certify that the said record is by virtue of the Writ of Error and the Citation issued in said cause, and the return thereof made in accordance therewith.

I further certify that the said record on Writ of Error was prepared by me in my office, and that the cost of preparation, examination and certificate,

amounting to one hundred and twenty-eight dollars and forty-five cents ($128.45), has been paid to me by J. W. Martin, plaintiff in error herein.

In witness whereof I have hereunto set my hand and the seal of the above-entitled Court this 14th day of April, 1909.

[Seal] C. C. PAGE,
Clerk.

By ————————,
Deputy.

[Endorsed]: No. 1712. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Martin, Plaintiff in Error, vs. George C. Burford, Jules B. Caro, Charles E. Hooker and J. B. Caro, Partners Doing Business Under the Firm Name and Style of J. B. Caro & Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed April 21, 1909.

F. D. MONCKTON,
Clerk.

No. 1712

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. MARTIN,

Plaintiff in Error,

vs.

GEO. C. BURFORD, JULES B. CARO, CHARLES E. HOOKER, and J. B. CARO PARTNERS Doing Business Under the Firm Name and Style of J. B. CARO & CO.,

Defendants in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

E. M. BARNES,
Attorney for Plaintiff.

DAILY ALASKA DISPATCH, PRINT, JUNEAU

No. 1712

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. MARTIN,

Plaintiff in Error,

vs.

GEO. C. BURFORD, JULES B. CARO, CHARLES E. HOOKER, and J. B. CARO PARTNERS Doing Business Under the Firm Name and Style of J. B. CARO & CO.,

Defendants in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

E. M. BARNES,
Attorney for Plaintiff.

DAILY ALASKA DISPATCH, PRINT, JUNEAU

DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION No. 1, AT JUNEAU

No. 572-A.

J. W. MARTIN,

Plff.,

vs.

GEO. C. BURFORD, JULES B. CARO, CHARLES E. HOOKER, and J. B. CARO AND PARTNERS, Doing Business Under the Firm Name and Style of J. B. CARO & CO.,

Defts.

STATEMENT OF THE CASE.

On the 28th day of August, 1905, plff. in error, paid to defts. herein, the sum of $2,000, for property among other things one store building and site situated at Farragut Bay, Alaska, and that in order to induce plff. to make said payments, the defts. and each of them wantonly and falsely represented in writing to plff. that they owned the store building and that said statement was false and was wilfully false and was wantonly made by said deft. and each of them and was acted on by this plff. in the belief of its truth and at the same time of making it, it

was known by said defts. and each of them to be false and was made by said defts. and each of them with the intent to deceive this plff. and this plff. thereby suffering injury, to-wit; the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts. plff. was at the time wholly ignorant of the truth or falsity of said statements but believed the same to be true and that the time plff. had no means of learning the truth or falsity of said statements, and plff. would not have paid said sum of $2,000, or any part thereof, had it not been for plff's belief in the truth of such statements, and that defts. nor neither of them, at any time, ever had any title or ownership or were they or either of them ever the owners or in possession of said store building or site nor were they nor either of them ever entitled to sell the same nor had they at the commencement of this action such title or ownership or possession or so entitled to sell. Plff. claimed compensatory damages in the sum of $2,000, and exemplary damages in the sum of $1,000. The defts. denied plff. paid the sum of $2,000, or any other sum, denied that they represented to plff. that they or any of them owned a store building and site referred to in plff's. complaint or that plff. suffered any injury and denied that they at any time had any title or ownership over the said property, denied that they or either of them ever were entitled to sell the same. Denied that the plff. was entitled to any exemplary damages and on the said 28th day of August, 1905, deft. Geo. C. Burford had an option of a

store building and site at Farragut Bay, Alaska, and that was all that was sold to plff. It had been stipulated that the answer of J. B. Caro should be taken as the answer of all and set up that plff. and deft. Geo. C. Burford entered by parol into a new and different agreement and settlement concerning their interests in said outfit and it was then and there agreed by and between the said Geo. C. Burford and this plff. that they would abandon the Farragut Bay project and the said Geo. C. Burford should not exercise said option in the purchase of the said store building and site at Farragut Bay but that the said plff. should nevertheless hold his said one-third (1-3) interest in and to said fishing outfit with the exception of the said building and site which was and had been placed by the said partners to be of no greater worth nor value than the sum of $250.

After a trial by jury judgment was given in favor of defts., hence the prosecution of this writ of error.

[Same Court—Same Cause.]

COMPLAINT.

And now comes plff. and for cause of action against defts. alleges:

I.

That on the 28th day of Aug., 1905, he paid to defts. the sum of two thousand dollars, as is evi-

denced by the receipt of defts. herein following, and for the property named in said receipt, which said receipt is in words and figures following, to wit:

Know all men by these presents: That we, George C. Burford and J. B. Caro & Company, of the town of Juneau, District of Alaska, for and in consideration of the sum of two thousand ($2,000.00) dollars, to us in hand paid, receipt whereof is hereby acknowledged, do hereby sell, transfer and assign unto J. W. Martin, of the town of Haines, Alaska, one-third (1-3) interest in and to the following-described property, to wit:

One scow "Skagitt," her lines, gear, etc.; one scow "Volunteer," her lines, gear, anchor, etc.; one log-float; seine-boat and seines; seines; sale barrels; tierces; salmon troughs; and one store building and site situated at Farragut Bay, Alaska, together with all things pertaining to the fishing outfit known as the "Arctic Fishing & Packing Company"; except the launch "Tillicum," which said launch is hereby expressly reserved.

And the said parties of the first part hereby covenant that they are the owners and entitled to sell the said one-third interest of all of the above-described property, which said property is known as the said "Arctic Fishing & Packing Company" and set over the same to the said second party.

In testimony whereof we have hereunto set our hands and seals this 28th day of August, 1905.

GEORGE C. BURFORD [Seal]
J. B. CARO & CO. [Seal]
By CHAS. E. HOOKER,
J. B. CARO.

Signed, sealed and delivered in presence of
C. A. MacGREGOR,
L. B. FRANCIS.

II.

That in order to induce plff. to make said payment the defts., and each of them, wantonly and falsely represented in said writing to plffs. that they owned the store building and site as named in said writing and were entitled to sell the same.

III.

That said last-named statement, and the whole thereof, was willfully false and was wantonly made by said defts., and each of them, and was acted on by this plff. in the belief of its truth, and at the time of making it it was known by said defts. and each of them to be false, and was made by said defts., and each of them, with the intent to deceive this plff., and this plff., thereby suffered injury, to wit, the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts. Plff. was at the time wholly ignorant of the truth or falsity of said statements, but believed the same to be true, and at the time plff. had no means of learning the truth or falsity of said statement. Plff. would not have paid said sum of $2,000, or any part thereof, had it not been for plff's. belief in truth of said statement.

IV.

Defts., nor either of them, at any time ever had any title or ownership, or were they or either of them ever the owners or in possession of said store building or site, nor were they or either of them ever entitled to sell the same, nor have they now such title or ownership or possession, or so entitled to sell.

V.

That by said false statements of defts., as aforesaid, plff. has been damaged in sum of $2,000.

VI.

That plff. claims as exemplary damages in the sum of $1,000.

Whereof, plff. prays judgment againt defts. and each of them in sum of $3,000, and for his costs and disbursements herein expended.

E. M. BARNES,
Atty. for Plff.

United States of America,
District of Alaska,—ss.

I, J. W. Martin, being first duly sworn, on oath say: That I am the plff. in the above-entitled action; that I have read the foregoing complaint ane know the contents thereof, and believe the same to be true.

J. W. MARTIN

Subcribed and sworn before me this 22nd day of November, 1906.

[Seal] GUY McNAUGHTON,
Notary Public for Alaska.

No. 572-A. District Court for the District of Alaska, Division No. 1, at Juneau. J. W. Martin, Plaintiff, vs. J. B. Caro et al., Defendants. Complaint at Law. Filed Nov. 11, 1906. C. C. Page, Clerk. By A. L. Collison, Deputy. E. M. Barmes, Attorney for Plff. Office: Juneau, Alaska, Valentine Building.

[Same Court—Same Cause.]

ANSWER OF J. B. CARO

Comes now the defendant, Jules B. Caro, and answering for himself alone, admits, denies and alleges as follows.

I.

1. This answering defendant denies that plaintiff paid to him or to all or any of his codefendants herein, or at all, the sum of two thousand dollars ($2,000.00), or any other sum or sums whatsoever, except as hereinafter stated.

2. Denies that he ever executed or delivered to the plaintiff the writing referred to in plaintiff's complaint as a receipt, and further that he or any of his codefendants wantonly or falsely, or at all, represented to the plaintiff that they or any of them owned a store building and site referred to in said writing is said complaint alleged.

3. This defendant, further answering, denies each and every allegation in paragraph three (3) of said complaint.

4. This answering defendant further denies each and every allegation in the fourth paragraph of plaintiff's complaint contained.

5. Answering defendant further denies that the plaintiff has been damaged in the sum of two thousand dollars, or in any other sum whatsoever, and denies that the said plaintiff is entitled to the sum of one thousand dollars, or any other sum, as exemplary damages herein.

II.

And the defendant J. B. Caro, further answering for himself herein, and by way of affirmative defense, alleges:

1. That on or about the 28th day of August, 1905, and prior thereto, the defendant George C. Burford was the owner of a certain fishing outfit consisting of the scow "Skagitt," her lines, gear, etc.; the scow "Volunteer," her lines, gear, etc.; one log-float, seine-boat and seins, salt, barrels, tierces, trawls, together with other articles pertaining to the said outfit, which said fishing outfit was formerly owned by the Arctic Fishing & Packing Company; that at said time the said George C. Burford also had an option of a certain store building and site at Farragut Bay, in Southeastern Alaska;

2. That on or about the said 28th day of August, 1905, the said George C. Burford sold to the plaintiff a one-third interest in and to the entire fishing outfit aforesaid, save and excepting a certain launch, called the "Tillicum," which had formerly belonged

to said outfit, for which interest the plaintiff then and there agreed to pay said George C. Burford the sum of two thousand dollars; and the said George C. Burford then and there agreed, after explaining in full to the plaintiff all the details in connection with his said option hereinbefore referred to upon said store building and at Farragut bay, to exercise and take up the said option, and to convey a one-third interest in the property covered thereby as a part of the outfit so purchased by the plaintiff for the said sum of two thousand dollars; that before said purchase was made the said George C. Burford fully and fairly explained to the plaintiff that he merely held an option on said site and building at Farragut bay, but agreed with the plaintiff nevertheless to exercise his said option as aforesaid, and that the plaintiff should become the owner of a one-third interest in and to the property covered thereby upon the exercise thereof and with that understanding, and without the concealment of any of facts by said Burford from the plaintiff, but upon a full and fair understanding and agreement upon all the facts in connection with said purchase as hereinbefore stated, the said Burford sold to the said plaintiff a one-third interest in and to the fishing outfit and option property aforesaid for the said sum of two thousand dollars, and executed to the plaintiff the bill of sale, copy of which is set out in the complaint herein.

3. That the firm of J. B. Caro & Co., consisting of the said Charles E. Hooker and Jules B. Caro, were at one time interested in a copartnership doing

business as the Arctic Fishing & Packing Co., and that the signature of said firm was affixed to the bill of sale aforesaid by the said Charles E. Hooker for no purpose except to convey to the plaintiff whatever interest said firm might still have in the outfit conveyed, by reason of their former ownership and interest in and to the said Arctic Fishing & Packing Co., and for no other further or different purpose whatsoever, all of which was well-known and understood by the plaintiff at the time of the execution of the said bill of sale, and he, the plaintiff, well knew at that time that the signature of the said firm of J. B. Caro & Company was affixed for no other purpose.

4. This defendant, further answering, says that he never signed said document or bill of sale referred to in the complaint herein, and never authorized his name to be signed to the same as an individual, but that his name, as appears on said bill of sale, is and appears only as a member of the said firm of J. B. Caro & Company, and was affixed by his said partner, Charles E. Hooker, as above narrated, and not otherwise.

5. That the plaintiff J. W. Martin agreed to pay for his one-third interest in and to said fishing outfit, store building and site the sum of two thousand dollars to the said George C. Burford, a small portion of which said sum was then and there paid in cash, and the balance in notes of hand of the plaintiff; that immediately after the plaintiff had so purchased said interest in said outfit, said outfit in charge of the said George C. Burford proceeded at said Farragut

bay with the fishing business as contemplated by the parties interested therein, including the plaintiff, and after losing considerable time and expense in an attempt to do so, was finally compelled, by storm and heavy seas, to put in at Wrangell Narrows for shelter and to save said outfit damage; that in the meantime it was also learned for the first time by the said George C. Burford that the Pacific Coast Steamship Company, a common carrier of frieght in the District of Alaska, and upon whose ship the parties of said fishing venture expected to ship the fish taken in said venture at Farragut bay to the markets at Seattle, Washington, would not call in at Farragut bay for the fish so taken, thus making it impracticable and impossible to carry on said fishing business at said Farragut bay at a profit.

6. That a short time thereafter, the said plaintiff and the said George C. Burford entered by parol into a new and different agreement and settlement concerning their interests in said outfit, which said agreement and settlement was made necessary by reason of the circumstances above narrated; and it was then and there agreed by and between the said George C. Burford and the said plaintiff that they would abandon the Farragut bay project, and continue in the fishing business at Wrangell Narrows, and that the said Burford should not exercise said option in the purchase of the said store building and site at said Farragut bay, but that the said plaintiff should nevertheless hold his one-third interest in and to said fishing outfit above referred to with the excep-

tion of the said building and site, which was and had been valued by the said partners to be of no greater worth or value than the sum of two hundred and fifty dollars ($250.00), and that from then henceforth they were to be partners in the fishing outfit aforesaid with the exception of said site in the following proportions, that is to say: That the said George Burford should own a two-third interest therein, and the plaintiff should own a one-third interest therein, and that, in consideration of the fact that the said Farragut bay project should and had been abondoned and the said Burford should not be compelled to exercise his option thereon and convey to the plaintiff an interest in and to said building and site aforesaid; that the said plaintiff should be relieved from the payment to the said George C. Burford of a certain promissory note in the sum of five hundred dollars ($500.00) theretofore given by the plaintiff as part of the purchase price of two thousand dollars as aforesaid, and that whereas such new and different agreement was made and entered into at or near Petersburg, Alaska, and said promissory note had been left by the said Burford at Juneau, Alaska, for safekeeping, the said Burford then and there gave to the plaintiff his certain writing wherein it was stated that said note was canceled, and should not be presented for payment in consideration of the fact that the plaintiff would not demand a one-third interest in and to the said Farragut bay site as hereinbefore referred to, and other considerations therein named; and that thereupon all differences existing

by and between the said parties were settled and adjusted.

7. That the said George C. Burford now is, and at all times mentioned herein was, willing and ready to deliver and surrender the said note of $500 of the plaintiff, to plaintiff, and was and has been prevented from so doing by reason of the fact that the said note was at said time left by him at Juneau for safekeeping and was not accessible at said time for cancellation, and is ready and willing at any time to surrender the same to plaintiff, and has never presented the same for payment, but has in all respects complied with and carried out the terms and conditions of said settlement and adjustment; that the value of the said Farragut bay site and store was never any greater than the said sum of two hundred and fifty dollars ($250.00), but that owing to the fact that losses had been incurred in said venture and all of the parties interested had lost money on the same, the said George C. Burford made the liberal settlement and adjustment with the plaintiff above referred to and cancelled said note of the plaintiff for $500 so held by him, upon the consideration herein stated.

Wherefore, this answering defendant prays that plaintiff's action be dismissed and that he recover nothing by reason thereof, and that the defendant have his cost aud disbursements in this behalf expended.

J. A. HELLENTHAL,
Attorney for J. B. Caro.

United States of America,
District of Alaska,—ss.

Jules B. Caro, being first duly sworn according to law, deposes and says that he is the answering defendant in the above-entitled cause of action, that he has read the foregoing answer and knows the contents thereof, and that the same is true as he verily believes.

J. B. CARO.

Subscribed and sworn to before me this 18th day of April, 1907.

[Seal] GUY McNAUGHTON,
Notary Public for Alaska.

[Same Court—Same Cause.]

[REPLY.]

And now comes plff. and for reply to defts.' affirmative matter set up in their answer herein:

Denies each and every allegation thereof.

Wherefore, plff. prays the prayer of this complaint herein be granted.

E. M. BARNES,
Atty. for Plff.

[MOTION TO MAKE MORE DEFINITE, ETC.]

[Same Court—Same Cause.]

And now comes plff. and moves that deft. Caro makes more definite and certain his affirmative DENSE herein in this:

In par. 2 thereof how he explained to plff. whether in writing or otherwise, the details therein mentioned, and in par. 6 thereof whether the agreement named therein was in writing or otherwise.

E. M. BARNES,
Attorney for Plff.

[Same Court—Same Cause.]

ORDER ALLOWING AMENDMENT TO ANSWER BY INTERLINEATION, ETC.

Now, on this day, this matter coming on for hearing upon the motion of plaintiff to make the answer more definite, the plaintiff appearing by E. M. Barnes, Esq., and the defendants appearing by J. A. Hellenthal, Esq., and after argument had and the Court being fully advised in the premises grants said motion, and the defendant is given three days in which to amend said answer by interlineation.

(Tuesday, June 4, 1907, Civil Journal E., page 199.)

JAMES WICKERSHAM,
Judge.

The plff. offered the following instructions:

This is an action for alleged deceit of the plff. by the defts. on account of representations made by defts. The gist of this action is fradulently producing a false impression on the mind of the plff. This instruction the Court refused to give, to which ruling of the court the plff. duly accepted. Refusing R. A. G. Exception allowed. And this ruling plff. assigns as error.

Plff. offered the following instructions:

Plff. alleges that in order to induce plff. to make such payment, the defts. and each of them, wantonly and falsely represented in said writing to plff. that they owned the store building and were entitled to sell the same, and that the whole of said statement was false and was acted on by plff. in the belief of its truth, and at the time of being made it was known by the deft., and each of them, to be false and was made by the defts., and each of them, with intent to deceive plff., and plff. thereby suffered injury to wit, in the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts. and that plff. at the time was wholly ignorant of the truth or falsity of the said statement but believed the same to be true, and at the time had no means of learning the truth or falsity of said statements and would have paid said sum of $2,000 or any part thereof had it not been for his belief in the truth of said statement, and that deft., or either of them, never at any time ever had any title or ownership or were they ever in possession of said store building, or site, nor were they, or either of them, ever entitled to sell the same, nor had they at the commencement of this action, such title, or were they entitled to sell the same, and that by said false and fraudulent statements of the defts. plff. has been damaged in the sum of $2,000, and plff. claims exemplary damages in the sum of $1,000.00. I charge you, that if you believe from a preponderance of the evidence that the above facts have been proven, then

it is your duty to find for the plff. Refused R. A. G. Exception allowed. And this ruling plff. assigns as error.

Plff. offered the following instructions to the jury, which by the Court were refused and to which ruling plff. then and there duly accepted. And which rulings plff. assigns as error.

4.

I charge you the law is, if a fact is represented by a party and that fact is susceptible of accurate knowledge and the speaker is or may be well presumed to be cognizant thereof, while the other party is ignorant and the statement is a positive statement containing nothing improbable or unreasonable as to put the other party upon further inquiry, or give him cause to suspect of his faults, and an investigation would be necessary for him to discover the truth, the statement may be relied on, hence I charge you, that the facts of the defts. ownership of the building and site of Farragut Bay was a fact susceptible of accurate knowledge, and the defts. well knew whether or no they were such owners, and there was nothing improbable or unreasonable in the statement, and if you believe from a preponderance of the testimony, that an investigation would have been necessary for plffs. to learn the truth or falsity of said statement, then I charge you, plff. was entitled to rely on said statements.

Refused R. A. G. Exceptions allowed.

Plff. offered the following instructions:

Plff. alleges that in order to induce plff. to make such payment, the defts. and each of them, wantonly and falsely represented in said writing to plff. that they owned the store building and were entitled to sell the same, and that the whole of said statement was false and was acted on by plff. in the belief of its truth, and at the time of being made it was known by the deft., and each of them, to be false and was made by the defts., and each of them, with intent to deceive plff., and plff. thereby suffered injury to wit, in the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts. and that plff. at the time was wholly ignorant of the truth or falsity of the said statement but believed the same to be true, and at the time had no means of learning the truth or falsity of said statements and would have paid said sum of $2,000 or any part thereof had it not been for his belief in the truth of said statement, and that deft., or either of them, never at any time ever had any title or ownership or were they ever in possession of said store building, or site, nor were they, or either of them, ever entitled to sell the same, nor had they at the commencement of this action, such title, or were they entitled to sell the same, and that by said false and fraudulent statements of the defts. plff. has been damaged in the sum of $2,000, and plff. claims exemplary damages in the sum of $1,000.00. I charge you, that if you believe from a preponderance of the evidence that the above facts have been proven, then

it is your duty to find for the plff. Refused R. A. G. Exception allowed. And this ruling plff. assigns as error.

Plff. offered the following instructions to the jury, which by the Court were refused and to which ruling plff. then and there duly accepted. And which rulings plff. assigns as error.

4.

I charge you the law is, if a fact is represented by a party and that fact is susceptible of accurate knowledge and the speaker is or may be well presumed to be cognizant thereof, while the other party is ignorant and the statement is a positive statement containing nothing improbable or unreasonable as to put the other party upon further inquiry, or give him cause to suspect of his faults, and an investigation would be necessary for him to discover the truth, the statement may be relied on, hence I charge you, that the facts of the defts. ownership of the building and site of Farragut Bay was a fact susceptible of accurate knowledge, and the defts. well knew whether or no they were such owners, and there was nothing improbable or unreasonable in the statement, and if you believe from a preponderance of the testimony, that an investigation would have been necessary for plffs. to learn the truth or falsity of said statement, then I charge you, plff. was entitled to rely on said statements.

Refused R. A. G. Exceptions allowed.

5.

The fact of the ownership of said store and site by the defts. is a natural fact, and it was made with knowledge of its falsity, and as a positive assertion; hence I charge you the law is, a fraudulent intent on the part of defts. as inferred in its making.

Refused R. A. G. Exception allowed.

6.

The nearness of the signing of said bill of warranty by the defts. and the payment of said money by the plff. is a fact to be considered by you in determining whether the misrepresentations were relied on by plff.; hence I charge you that if the signing of said agreement by defts. was followed immediately by the payment of the money by plff., then the law is, plff. relied on said statements.

Refused R. A. G. Exception allowed.

8.

Where parties are not in possession of land and have neither color or claim of title, under any instrument purporting to convey the premises, or any judgment establishing their rights to them, and makes false and fraudulent representations as to the title, the purchaser acting on those false and fraudulent representations may maintain an action.

Refused R. A. G. Exception allowed.

Where a vendor in a sale or exchange of real or personal property, makes false representations as to material facts relating to the property, having at the time knowledge that his statements are false, or

what the law regards as equivalent to such knowledge, and intending that the purchases shall rely upon them, as an inducement to the purchase, he becomes liable in an action of deceit, in case the purchaser, acting in reliance upon the representations, consummates the purchase and suffers loss thereby.

Refused R. A. G. Exception allowed.

8.

The plff. in this action asks for exemplary damages; in a proper case a party has as much right to exemplary damages as he has to compensatory damages, and it is as much a jury's duty to award in such a case exemplary damages as compensatory damages.

Compensatory damages are damages in compensation of the loss suffered. Exemplary damages may be awarded in all actions of tort, in addition to the sum awarded by way of compensation for the plff.'s injury, if the deft. has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the deft. is required in order to charge him with exemplary damages.

Refused R. A. G. Exception allowed.

10.

If you believe from a preponderance of the evidence that the defts. in making the statement in writing to plff. that they were the owners of and entitled to sell a one-third interest of one store building and

site at Farragut bay, Alaska, had a reckless disregard of the rights of plff., then it is your duty to include in your verdict, in addition to the amount to reimburse plff., for his actual loss, such sum by way exemplary damages, as, in your judgment, may serve as a protection to society against the violation of personal rights, provided you also find from a preponderance of the evidence, that said statement was false, and was made to induce plff. to pay said sum, and was acted on by plff. in the belief of its truth, and at the time of making it was known by said defts., and each of them, to be false and was made by said defts. and each of them with intent to deceive plff., and plff. thereby suffered injury, to wit, in the loss of his $2,000.00, and so that the same could be wrongfully acquired by defts., and that plff. was wholly ignorant of the truth or falsity of said writing; but intended it to be true, and at the time plff. had no means of learning the truth or falsity of said statements, and that plff. would not have paid the said sum of $2,000 or any part thereof, but for his belief in the truth of said statements:

Refused R. A. G. Exception allowed.

XI.

Plff. alleges that in order to induce him to make the payment of $2,000, defts. wantonly and falsely represented in said writing that they owned the store building and site named therein, and that he would not have paid said sum or any part thereof but for said statement in writing; other articles are named in said writing, but no value has been placed

on them by either plff. or deft., hence these articles are valueless. The only property in said writing that have a value is the building and site which defts. allege is of no greater value than $250, this fact may be taken into consideration by you in deciding whether or no the allegation "that but for said statement in writing plff. would not have paid said sum of $2,000, or any part thereof," you may consider whether or no plff. as a reasonable man would have paid said sum of $2,000.00 or any part thereof for property which had no value.

Refused R. A. G. Exception allowed.

XII.

In actions of this kind the law infers an improper motive if what the deft. said was false within their knowledge, and occasioned damage to the plff.

Refused R. A. G. Exception allowed.

XIII.

In case you find that the plff. is entitled to recover, then I charge you he is entitled to be placed in the same position he was before this transaction complained of took place, and that the value of the Farragut bay property is not the sole damage, pltf. is entitled to recover.

Refused R. A. G. Exception allowed.

XIV.

The defts. set up a settlement between them and the plff.; before you find for the defts., you must find by a preponderance of the evidence that the settle-

ment mentioned and evidenced by the receipt against the $500 note introduced in evidence was a settlement of the demand plff. urges against the defts. on account of the transaction concerning the Farragut bay property, and was not a settlement for articles missing from the inventory, provided you also find that plff. was misled by the statements complained of.

Refused R. A. G. Exception allowed.

XI.

You are instructed that if the plff. was aware that the representations alleged to have been made to him were false, or if the representations and surrounding circumstances and conditions were such as ought to have aroused a suspicion as to their truth in the mind of a person of ordinary business care and caution, then he cannot recover unless he exercise ordinary diligence in endeavoring to ascertain whether or not the representations were true or false; and if you find that the suspicions of an ordinarily prudent and careful business man would have been aroused thereby, and that plff. did not exercise such diligence, he cannot recover. And before you return a verdict for the plff. in this cause, you must be satisfied by preponderence of the testimony as defined in these instructions not only that the representations are of a character and made in the manner and with the intent as alleged, but that they were also made under such circumstances, and the condition surrounding the transac-

tions were such as to deceive a person acting with reasonable care and ordinary prudence and caution; and in determining this question, you should consider all the circumstances under which the alleged representation appear from the evidence to have been made, and whether under such circumstances the representations were such as a person of common and ordinary prudence would or should have relied upon, or such as would be likely to deceive such a person. Plff. excepts, and exception allowed—R. A. G.

Record pages 48 and 49.

XXI.

I instruct you, gentlemen of the jury, that a bare, naked statement made by the defts., if you believe from the evidence that they made such statements, that they were the owners of the store building and site at Farragut Bay, and entitled to sell the same, unaccompanied by any other statement or fact bearing upon their title or right to sell the same, or made no other representation from which the plff. was induced to believe in such ownership or right to sell, is not such a statement as conform the basis of an action Plff. excepts, exception allowed—R. A. G.

Record page 49.

XXII.

I instruct you, gentlemen of the jury, that if you find from the evidence in this case that the deft. Burford, told the plff. that he had an option on the store building and site at Farragut bay, and did not

represent himself that he was the owner thereof prior to the time that the bill of sale offered in evidence provides that the defts. were the owner of and entitled to said store building and site, and you should find for the defts. Plff. excepts and exception allowed—R. A. G.

Record page 49.

XXIII.

I instruct you, gentlemen of the jury, that the statements made in a certain letter, Plff's. Exhibit No. 3, offered in evidence, written by the defts. J. B. Caro & Co. to the plff. at Haines, with reference to the mercantile business at Farragut bay, is a mere expression of opinion and not such a false representation as, for standing alone, can form a basis of an action for decert. Plff. excepts, expression allowed—R. A. G.

Record page 50.

ARGUMENT

Plff. offered the following instruction: "This is an action for alleged deceit of the plff. by the defendants on account of representations made by defts. The grist of this action is fraudulent producing a false impression on the mind of the plff.

"Know all men by these presents,—We, Geo. C. Burford and J. B. Caro and Company of the town of Juneau, District of Alaska, for and in consideration of the sum of two thousand dollars ($2,000.00) to us

in hand paid, receipt whereof is hereby acknowledged do hereby sell, transfer and assign into J. W. Martin of the town of Haines, Alaska, one-third (1-3) interest in and to the following described property, towit, among other things, one store building and site situated at Farragut bay, Alaska, and the said parties of the first part hereby covenants that they are the owners and entitled to sell the said one-third interest of all the above described property, which said property is known as the Arctic Fishing and Packing Company and set over the same to the said second party. In testimony whereof we have hereunto set our hands and seals this 28th day of August, A. D. 1905.

GEORGE C. BURFORD [Seal]
J. B. CARO & CO. [Seal]
By CHAS. E. HOOKER,
J. B. CARO.

Signed, sealed and delivered in presence of
C. A. MacGREGOR,
L. B. FRANCIS."

which the Court refused to give and to which ruling Plff. duly excepted and the exception was allowed by the Court.

Plff's. authority therefor is,

Stewart vs. Wyoming Cattle Ranch Co., 128 U. S., 383.

Record pages 40, 41 and 42.

Plff offered the following instruction : "Plaintiff alleges that in order to induce plff. to make said payment, the defts. and each of them wantonly and

falsely represented in said writing to plff. that they owned the store building and were entitled to sell the same, and that the whole of said statement was false and was acted on by plff. in the belief of its truth, and at the time of its being made it was known by the defts. and each of them to be false, and was made by defts. and each of them with intent to deceive plff. , and plff. thereby suffered injury, towit, in the loss of his said $2,000, and so that the same could be wrongfully acquired by these defts., and that plff. at the time was wholly ignorant of the truth or falsity of the said statement, but believed the same to be true, and at the time plff. had no means of learning the truth or falsity of said statements and would not have paid said sum of $2,000 or any part thereof had it not been for his belief in the truth of said statement, and that defts. or either of them never at any time ever had any title or ownership or were they ever in possession of said store building or site, nor were they or either of them ever entitled to sell the same, nor had they at the time of the commencement of this action such title or were they entitled to sell the same, and that by said false and fraudulent statements of defts., plff. has been damaged in the sum of $2,000,and plff. claims exemplary damages in the sum of $1,000. Refused R. A. G. Exception allowed.

"I charge you that if you believe from a preponderance of the evidence that the above facts have been proven, then it is your duty to find for the plff. Refused R. A. G. Exception allowed"; which instru-

ctions the Court refused to give and to which ruling Plff. duly excepted and his exception was allowed.

Record pages 286 and 287.

Plff. offered the following instruction: "I charge you the law is, if a fact is represented by a party and that fact is susceptible of accurate knowledge and the speaker is or may be well presumed to be cognizant thereof while the other party is ignorant and the statement is a positive statement containing nothing improbable or unreasonable as to put the other party upon further inquiry or give him (20 Cyc., p. 33) cause to suspect it as false, and an investigation would be necessary for him to discover the truth, the statement may be relied on; hence I charge you that the fact of defts. ownership of the building and site at Farragut bay was a fact susceptible of accurate knowledge, and the defts. well knew whether or no they were such owners, and there was nothing improbable or unreasonable in the statement and if you believe in the preponderance of the testimony that an investigation would have been necessary for plff. to learn the truth or falsity of said statement, then I charge you plaintiff was entitled to rely on said statement. Refused R. A. G. Exception allowed;" which instruction the Court refused to give and to which ruling Plff. duly excepted and his exception was allowed.

Record page 287 and 288.

Plff's. authority therefor for offering said instruction is to be found in,

20 Cyc, page 33.

Plff. offered the following instruction: "The fact of the ownership of said store and site by the defts. is a natural fact and it was made with knowledge of its falsity and as a positive assertion; hence I charge you the law is a fraudulent intent on the part of defts. as inferred in its making. Refused R.A.G. Exception allowed;" which instruction the Court refused to give and to which ruling Plff. fully excepted and his exception was allowed.

Authority is 20 Cyc., page 37.

Record page 288.

Plff. offered the following instruction: "The nearness of the signing said bill of warranty by the defts. and the payment of said money by plff. is a fact to be considered by you in determining whether the misrepresentations were relied on by the plff.; hence I charge you that if the signing of said agreement by the defts. was followed immediately by the payment of the money by plff., then the law is plff. relied on said statements. Refused R. A. G. Exception allowed. 20 Cyc. 42;" which was refused by the Court and to which ruling Plff. duly excepted and his exceptions were duly allowed.

Record page 288.

Plff's. authority was, 20 Cyc., page 42.

Plff. offered the following instructions: "Where parties are not in possession of land and have neither color or claim of title under any instrument purporting to convey the premises or any judgment establishing their rights to them and make false and

fraudulent representations as to the title, the purchaser acting on those false and fraudulent misrepresentations may maintain an action. Andrus vs. St. Louis Smelting and Refining Co., 130 U. S. 643. Refused R. A. G. Exception allowed;" the Court refused to instruct the jury and the authority on which plff. relied upon was, Andrus vs. St. Louis Smelting and Refining Co., 130 U. S., page 643.

Record page 289.

Plff. offered the following instructions: "As a general rule, if a vendor of property, in order to induce a sale, makes a positive assertion as to any material fact which is peculiarly within his knowledge, and of which the purchaser is ignorant, such as the title · · · the statement may be relied on by the purchaser without further investigation; and if the statements are false and fraudulent and cause damage to the purchaser, he may hold the vendor liable for damages. Charged R. A. G. Idem, supra;" which the Court refused to deliver to the jury.

Record page 289.

Plff. offered the following instructions: "When a vendor in a sale or exchange of real or personal property makes false representations as to material facts relating to the property, having at the time knowledge that his statements are false or what the law regards as equivalent to such knowledge, and intending that the purchaser shall rely upon them as an inducement to the purchase, he becomes liable in an action of deceit in case

the purchaser, acting in reliance upon the representations, consumates the purchase and suffers loss thereby. Refused R. A. G. Exception allowed. 20 Cyc. 46;" which instructions the Court refused to give and plff's. authority therefore is 20 Cyc., page 46.

Record page 289.

Plff. offered the following instructions: "The plff. in this action asks for exemplary damages. In a proper case a party has as much right to exemplary damages as he has to compensatory damages, and it is as much a jury's duty to award, in such a case, exemplary damages as compensatory damages.

"Compensatory damages are damages in compensation of the loss suffered. 'Exemplary damages may be awarded in all actions of tort, in addition to the sum awarded by way of compensation for the plaintiff's injury, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the deft. is required in order to charge him with exemplary damages.' Refused. Exception allowed;" which the court refused to give.

Record pages 289 and 290.

Plff's authority therefore is

Lakeshore etc. R. Co. vs. Prentice, 147 U. S. 101-107;

Scott vs. Donald, 165 U. S., 58-87.

Plff. offered the following instruction: "If you

believe from a preponderance of the evidence that the defendants in making the statement in writing to plff. that they were the owners of and entitled to sell a one-third interest of one store building and site at Farragut Bay, Alaska, had a reckless disregard of the rights of plff., then it is your duty to include in your verdict, in addition to the amount to reimburse plff. for his actual loss, such sum by way of exemplary damages as, in your judgment, may serve as a protection to society against the violation of personal rights, provided you also find from a preponderance of the evidence that said statement was false, and made to induce plff. to pay said sum, and was acted on by plff. in the belief of its truth, and at the time of making it was known by said defts. and each of them to be false, and was made by said defts. and each of them with intent to deceive plff., and plff. thereby suffered injury, to wit, the loss of his $2,000, and so that the same could be wrongfully acbuired by defts. and that plff. was wholly ignorant of the truth or falsity of said writing; but believed it to be true, and at the time plff. had no means of learning the truth or falsity of said statement, and that plff. would not have paid the said sum of $2,000, or any part thereof, but for his belief in the truth of said statement. Refused R. A. G. Exception allowed;" and which instruction the court refused to give.

Record pages 290 and 291.

To the giving of all of the instructions named herein Plff. excepted and the court allowed the exception.

Plff. offered the following instruction: "Plff. alleges that in order to induce him to make the payment of $2,000, defts. wantonly and falsely represented in said writing that they owned the store building and site named therein, and that he would not have paid said sum or any part thereof but for said statement in writing; other articles are named in said writing, but no value has been placed on them by either plff. or defts.; hence those articles are valueless. The only property in said writing that has a value is the building and site which defts. allege is of no greater value than $250; this fact may be taken into consideration by you in deciding whether or no the allegation 'that but for said statement in writing plff. would not have paid said sum of $2,000 or any part thereof,' you may consider whether or no plff. as a reasonable man, would have paid said sum of $2,000, or any part thereof, for property which had no value. Refused R. A. G. Exception allowed;" which instruction the Court refused to give.

Record pages 291 and 292.

The law which plff. in error relies on for the error of the Court in giving instruction XI is to be found 62 Fed., page 723.

Plff. offered the following instruction: "In action of this kind the law infers an improper motive, if what the defts. said was false, within their knowledge, and occasion damage to the plff. Plff. excepted. Exception allowed. Refused R. A. G.

Record page 292.

"In case you find that the plff. is entitled to recover, then I charge y-u he is entitled to be placed in the the same position he was before the transaction complained of took place, and that the value of the Farragut bay property is not the sole damage which plff. is entitled to recover. Refused R. A. G. Exception allowed.

"The defendents set up a settlement between them and the plff.; before you find for the defendants you must find by a preponderance of the evidence that the settlement mentioned and evidenced by the receipt against the $500 note introduced in evidence was a settlement of the demand plff. urges against defts. on account of the transaction concerntng the Farragut bay property; and was not a settlement for articles missing from the inventory, provided you also find the plff. was misled by the written statement complained of. Refused. Plff. excepted. Exception allowed;" which instruction the Court refused to give.

Record page 292.

The Court gave the following instruction: "I instruct you, gentlemen of the jury; that a bare, naked, statement made by the defendants, if you believe from the evidence that they made such statement, that they were the owners of the store building and site at Farragut bay, and entitled to sell the same, if unaccompanied by any other statements of fact bearing upon their title or right to sell the same, or made no other representations from which the plaintiff was induced to believe in such owner-

ship or right to sell, is not such a statement as can form the basis of an action. Plaintiff excepts. Exceptions allowed.—R. A. G.;" to the giving of which plaintiff duly excepted and his execption was allowed.

Record page 284.

The Court gave the following instruction: "I instruct you, gentlemen of the jury, that if you find from the evidence in this case that the defendant Burford told the plaintiff that he had an option on the store building and site at Farragut bay and did not represent himself that he was the owner thereof prior to the time that the bill of sale offered in evidence was executed, then I instruct you that it is immaterial that the bill of sale offered in evidence provides that the defendants were the owners of and entitled to sell said store building and site, and you should find for the defendants. Plaintiff excepted. Exception allowed. R. A. G.

"I instruct you, gentlemen of the jury, that the statement made in a certain letter, Plaintiff's Exhibit No. 3, offered in evidence, written by the defendant J. B. Caro & Co., to the plaintiff at Haines, with reference to the mercantile business at Farragut bay, is a mere expression of opinion and not such a false representation as, standing alone, can form a basis of an action for deceit.

"Plaintiff excepts on the ground that instruction not justified by pleadings or evidence. Exceptions allowed. R. A. G.;" to the giving of which plff. duly excepted and his exception was allowed.

Record pages 284 and 285.

The Court permitted deft. to ask of the witness, J. W. Martin, plff., "George Burford did not tell you in Caro & Co.'s offices in the presence of Chas. Hooker all about this Farragut bay property, telling you that he had an option on it for $225, did he?" To which question plff. objected as not in cross examination. Plff's. objection was overruled and to which ruling plff. duly excepted.

As far as the examination at the time appeared to plff. there was no testimony in the direct examination that would permit this question to be asked on cross examination and a diligence search of the record fails to show that it was cross examination at this time, perhaps counsel for deft. in error may be able to show the Court where it was in cross examination, the Court gathers from the reading of the pleadings and the statement of the case that this was an action for deceit because the deft's. by a writing.

Record page 22. Guaranteed that they had the the title to the property. Plff. claimed they had no such title, then all their defense they set up, that one of them had an option and this matter being solely their defense it strikes plff. that it was for them to bring out in their case and not on cross examination of the plff. where no foundation had been laid therefore.

Deft. further asked the witness, "How much did you calculate that site for, Mr. Martin, as being worth in making up your estimate of the property that was being conveyed to you at that time?". Plff.

objected to the question on the grounds that it was immaterial. Objection overruled, and Plff. excepted.

Record page 25-27.

The evident intention of this question was to prove value. There was no value raised by the pleading, the only allegation of value is found in

Record on page 11. "With the exception of said building and site which was and has been valued by the said partners to be of no greater value than the sum of $250." To plff. this seems to be no allegation of value at all.

The deft. further asked the witness, "Didn't you get an interest in any outfit from George Burford?" To which plff. objected on the ground that the bill of sale was the best evidence and that does not say that he got it simply assigned and set it over to him. The objection was overruled and plff. excepted. And the witness answered, "Yes sir, I was supposed to get an interest in this fishing outfit."

The deft. further asked this witness, "You got everything except that Farragut bay site didn't you?" Answer, "No, sir."

Q. "What else didn't you get?"

A. "I didn't get anything as it was represented."

Q. "You didn't. How was it represented to you?"

To which question plff. objected because it is not cross examination and it is represented in the bill of sale. Objection overruled. Plff. excepted.

Record page 27.

Without prolonging this brief it seems to be no

argument necessary to show to the Court that these answers were not in cross examination.

The defts. further asked the witness, "You made a mistake in buying the scow." To which plff. objected on the ground that we were not complaining about this scow, supposing he did make a mistake he wanted that site to start business in, that is why he paid his money—he is a merchant not a ship man. He wanted to buy this store building so as to start another store. The pleadings show that these things were absolutely worthless, no value on them at all, hence the question is immaterial. Objection overruled. And plff. excepted and witness answered, "Well, yes it proved to be worthless. Of course we did not place any special value on it, but what little value there might have been considered to be upon it proved of no value."

The deft. asked the witness, "Did you pay all the money that you paid defts. merely for the Farragut bay site?" Plff. objected because it was not cross examination. Objection overruled and plff. excepted. The witness answered, "Yes, sir, solely for that purpose."

Record page 28.

Plff. still says that this question was not in cross examination in response to anything brought out in the direct examination.

The deft. asked the witness in referring to other matters and things, "There were put there to look good." To which question plff. objected on the ground that the record was the best evidence. Ob-

jection overruled and plff. excepted. The witness answered, "Yes sir, that is the only purpose that I can find on the proposition."

Record page 29.

It still strikes plff. that where there is a record of a transaction as there was in this case.

Record page 22 and 23. That record should speak for itself.

The deft. further asked the witness, "Did you make any inquiries with reference to Mr. Burford's ownership or the ownership of the other defendant's to this property." To which plff. objected on the ground that the law did not require him to make any inquiries. Objection overruled and plff. excepted. The witness answered, "No sir, I think not, I took Mr. Hooker's and Mr. Burford's word in the matter."

Record page 30.

The writer of this brief apologizes to the Court because he cannot now lay his hands on the law he has studied up in this case, he is lying in the hospital at Juneau, Alaska, suffering severely from an accidental gun wound, which is at all times very painful. He cannot raise his head from the pillow and was in hopes that deft's. counsel would consent to a continuance but three days ago he received a written notice from them to furnish a brief as soon as possible, hence he will do the best that he can.

This question of law that on such cases as this the purchaser does not have to look up the title but may depend upon the statement of the vendor and if such

statements proves false an action will lie, it is well settled by many decisions. I can not now recall those decisions but from memory I think a very clear opinion was rendered by Judge Hawley where in he shows the law and the reason for the law and I would ask the indulgence of the Court in this matter, owing to the facts stated herein. This case goes to the grist of the action, if he should have required and did not require them he has no cause for action. If he should not have required and the Court compelled him to tell the jury that he did not it is an inference to be drawn by the jury that his whole duty was not done.

The deft. further asked the witness, "Did you ever go to the record here to examine the title to the property or did any one go for you." To which plff. objected on the ground of its immateriality. Objection overruled and plff. excepted. And the witness answered, "I think not, I relied on their word."

Record page 30-31.

Counsel respectfully refers the Court to the argument last made involving this same point.

The deft., George Burford, was called as a witness by defts. and was asked the question, "What, if any dealings did you have with the plff. at that time, August, 1905." Plff. objected to his stating his dealings on the ground that all their talk and all their actions were embodied in the bill of sale and they cannot now come in by parol evidence and endeavor to explain them away by anything that may have transpired before that writing was made

hence it is incompetent. And it comes under the allegations in the answer of which we made a motion and to which it was held by this Court that those dealings must be told to us whether they were in writing or by parol and they did not do it so they are precluded from testifying. Objection overruled and plff. excepted. And the witness answered, "At that time we took up the matter of fishing, we were talking of the fishing business and I explained to him the proposition that I had, · · · · Well we stated this, that I held an option on the Farragut bay property."

Record pages 31-32.

The Court can readily see from reference to this bill of sale heretofore cited that all their dealings and all their thoughts were culminated in that bill of sale which was signed by all of the defts. and delivered to the plff., hence that alone should speak for the talk had before its signing. Is is hardly fair after a party has paid his money and taken his title in writing then to allow the party who has received the money to come in and say, 'No the writing is not what it appears to be, in this case instead of us selling him the title to that Farragut bay property we only sold him the right to an option.' Now had defts. only sold him an option in the premises would not they so have inserted that fact in their bill of sale and receipt for the money? It does not take citations to convince the Court of the correctness of this legal proposition.

The court asked the witness George Burford to

state any conversation with relation to the price paid to Mr. Martin, and what it was paid for, for the buildings or for the outfit. Objected to by plff. as not tending to prove any issue raised by the pleadings. Objection overruled and plff. excepted. And the witness answered, "I told Mr. Martin the price I wanted for one-third interest in the Arctic Fishing & Packing Co., the company I was interested in. Plff. moved to strike the answer because it does not seem to be the property described in the bill of sale belonging to Caro & Co., and George Burford. The Arctic Fishing & Packing Co., did not sign the bill of sale. Motion overruled and plff. excepted.

The deft. further asked the witness, "Was there any conversation or agreement between you and Mr. Martin at which you placed the valuation on these different items that went into this transaction. Plff. objected because it tended to prove no issues raised by the pleadings, no value being plead. Objection overruled. Plff. excepted. And the witness answered "Mr. Martin asked me the valuation of the different things."

These three last objections are found on Record on Page 33.

It certainly strikes plff. that the first and third question neither of them tend to prove any issue raised by the pleadings. However deft's. counsel may find that these are issues raised by pleadings and therefore can show the Court that they are. And if these questions do not tend to prove any issue raised by the pleadings it was certainly error

to permit them to be asked because it took the minds of the jury away from the main issue in the case.

The deft. further asked the witness, "How about the value of the Farragut bay property." And to which the plff. objected on the grounds that it tended to prove no issue raised by the pleadings. Objection overruled and plff. excepted. And the witness answered, "He asked me about the Farragut bay property and I told him it was valued at about $250.00."

The deft. asked the witness George Burford, "Now what conversation did you have, if any, with Mr. Martin with reference to going into the merchantile business down there." Which plff. objected on the grounds of immaterialty. Their only allegation being that they went into the fish business. Objection overruled and plff. excepted. These objections are found on page 34 of the record.

Now scanning the pleadings as closely as can be scanned plff. is unable to find any contention whatsoever of any issue whatsoever about the value of the Farragut bay property.

Again the question as to what conversation with Mr. Martin with reference to going into the merchantile business certainly is immaterial because their only allegation is that they were to go into the fish business.

The deft. further said to the witness, "I hand you here a paper marked Deft.s' Exhibit E, for identification and offer it in evidence. To which plff. ob-

jected on the ground that it does not tend to prove any issue raised by the pleadings.

The issue raised by the pleadings is that this settlement was in writing and in that settlement he agreed that he would, "not demand a one-third interest in and to the said Farragut bay site as heretofore referred to." It is is immaterial because the inventory was a copy from the stock book and in the stock book this witness who made the inventory says the Farragut bay property was not invoiced, was not in that book consequently it can in no instance refer to the Farragut bay property. Objection overruled and plaintiff excepted. The witness had previously testified as follows:

THE COURT. There was not anything in your stock book on the site of the Farragut bay site?

ANS. No sir. That was the stock book of the Arctic Fishing & Packing Co.

And in response to the question admitted by the Court last above spoken on the paper was read to the jury as follows:

Petersburg, December 15, 1905.

I, the undersigned, this 15th day of Dec., 1905, cancel a note of $500.00 made in favor of Arctic Fishing and Packing Co., and signed J. W. Martin, dated August 28th, 1905, to run four months. This is in accordance with understanding the aforesaid parties had as certain articles were missing from the original inventory. The cancellation of this note is to make right these missing articles.

(Signed) Arctic Fishing and Packing Co. (Seal). (Signed) George C. Burford.

Record pages 34, 35 and 36.

Now the Court can readily see that the issue in this case was the deceit caused by deft. in regard to the sale of the Farragut bay property.

The Court can readily see from this testimony that the Farragut bay property was not in that stock book.

The Court can readily see that the inventory was a copy from the stock book and that this receipt was for and on account of certain articles missing from the original inventory.

Now the original inventory being a copy from the stock book of the Arctic Fishing and Packing Co., and having no relation whatsoever with the Farragut bay property it seems to plff. axiomatic. That the proposed testimony was immaterial and if it was immaterial its only tendency was to convince the jury and thereby the plff. suffered.

The deft. asked the witness Burford as follows: "What were the conversations had between you and Mr. Martin that led up to the execution of this receipt." To which plff. objected because it was not competent evidence now to vary by parol that written receipt which was as he testified the culmination of all their talk that shows what their talk was and parol evidence should not be permitted to change the terms of it. Objection overruled and plff. excepted. And the witness answered in full.

Record pages 36 and 37.

Plff. still contends that the rule of law quoted above is the rule governing such cases.

In answer to a question by plff. the witness testi-

fied that the option referred to was in writing, whereupon the plff. moved to strike all the testimony in relation to that option for the reason that the option was in writing and the witness had not shown due diligence in attemptng to procure the writing and the fact of its being in writing was not ascertained before the cross examination. Motion denied and plff. excepted.

Record pages 37 and 38.

Plff. submits this objection without argument.

Defts. asked their witness Hooker, "You may state what if anything was said by Burford to Mr. Martin touching his title or the title of the defts. or right to sell this fishing site and store building at Farragut bay." Objected to by plff. as tending to change the effect of the written contract and therefore incompetent. Objection overruled and plff. excepted. And the witness answered, "I do not remember just the language used of course, I know that he told him that he had these scows and this option on this property at Farragut bay, the fishing site."

The deft. asked the witness Hooker, "Were you present in Caro & Co.'s offices at the time that these negotiotions for the sale were pending. How did Burford act in this matter." To which plff. objected on the ground that the paper was the best evidence as to how Burford was acting. Objection overruled and plff. excepted and the witness answered, "Mr. Burford was the manager."

Record page 38.

The proposition here is a warrant bill of sale by

the deft's. to the plff. after the plff. ascertains the deft. has no title to the property and brings his action for deceit, the trial court permits the deft. to tell the jury that the paper was wrong that instead of having a title and selling a title he had only an option and sold the option. This Court will bear in mind that the alleged option was in writing. We objected to the contents being given without the priveledge of inspecting the writing and the Court refused our request and permitted this witness to detail to the jury without producing the writing that is the option detail to the jury the contents or effect in this option and thereby change the solemn terms of his written contract for which he has received a large sum of money.

Now can that be the legal way of bringing evidence before the jury this Court can readily see the effect such evidence will have before a jury and why the plff. lost his case.

Again Burford signs the papers as owner of the property and the Court permits in this last question him to come in and now say that instead of being the owner he was the manager, that is not so plead and it changes the terms of the contract.

Plff. moved that defts. make more definite and certain their affirmative defense in this in,

To know thereof how he explained to plff. whether in writing or otherwise the details therein mentioned and in,

Six (6) thereof whether the agreement was in writing or otherwise. The court duly sustained

plff's. motion and deft. wholly failed to amend their said answer in any particular and deft. asked the witness Burford, "What if any dealings did you have with the plff. at that time." To which the plff. objected on the grounds that it comes under the allegations in the answer to which plff. made a motion and which motion was sustained by the Court that these dealings must be alleged whether they were in writing or by parol and they did not do it so is precluded from testifying thereon. Objection overruled and plff. excepted and plff. further objected on the ground of incompetency, that all their talk, all their words, actions, and so forth, were embodied in the bill of sale and no long explanation of parol testimony can be introduced to vary the terms of that written and further our action is against Caro and Hooker and this man and we based our contract upon a statement made by all of them that no testimony can be introduced under their answer unless it is the language spoken by one in the presence of all in which all assented. Objection overruled and plff. excepted. And the witness answered, "At the time we took up the matter of fishing he said that he was thinking seriously of going into the fishing business, I said I was thinking of the same thing, we were talking of the fishing business and I explained to him the proposition."

Record pages 39 and 40.

The trial Court ruled that the deft. should state whether or no these statements were in writing or by parol.

Record pages 15 and 16.

The defts. failed to amend their answer as ordered by the Court, in that case it strikes plff. that they were out of court so far as that amendment was concerned, then why should this same trial Court after ordering them to state if the agreements and dealings were in writing or by parol and they failed to amend and so state, what standing had they in court and was it not an error to permit them to testify what those agreements and dealings were when they had not so amended their pleading. If a pleading is good it needs not amendment and if it needs amendment it is not good. The judgment of the trial Court being that it needed amendment its judgment was that the pleading was not good, nevertheless it gives defts. the benefit of that bad pleading to show in derogation of the plff's. rights. Evidence that he had a right to be warned before hand what it should be.

For the errors complained of, plff. confidently expects a reversal in this case. Physical pain prevents plff's. counsel making a more extended argument but he believes that this Honorable Court will reverse this for for the errors herein shown.

Respectfully Submitted,

E. M. BARNES,

Attorney for Plff. in Error.

No. 1712

IN THE

United States

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

J. W. MARTIN Plaintiff in Error,

vs.

GEORGE C. BURFORD,
JULES B. CARO,
CHARLES E. HOOKER, Et Al.
Defendants in Error.

MOTION TO DISMISS APPEAL

AND

ANSWER BRIEF

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

THE ALASKA DAILY RECORD PRINT, JUNEAU, ALASKA

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. MARTIN, *Plaintiff in Error.* vs. GEORGE C. BURFORD, JULES B. CARO, CHARLES E. HOOKER ET AL., *Defendants in Error.*	No. 1712

MOTION TO DISMISS APPEAL

SPECIAL APPEARANCE.

Come now the above named Defendants in Error, by their attorneys, John R. Winn and N. L. Burton (Winn & Burton), and appearing specially herein, move the above entitled Court to dismiss the appeal of appellant herein for the reason that said above entitled Court has not jurisdiction to entertain said appeal, nor has the Court jurisdiction of the person of George C. Burford, Jules B. Caro and Charles E.

Hooker or the partnership of J. B. Caro & Co., because:

I.

It appears from the Transcript of Record filed in the above entitled Court, at page 301 of the Record, that the citation issued herein and set forth on pages 299 and 300 of the Record, was never served on Jules B. Caro or Charles E. Hooker, or the partnership doing business under firm name and style of J. B. Caro & Co., part of the defendants in error; that the affidavit of E. M. Barnes of pretended service herein contained on page 301 of the Record, is the only attempted service claimed to have been made upon the last mentioned defendants in error and is in fact the only service of said citation that was ever made on said last mentioned defendants in error, or either of them.

II.

That no service or attempted service of any kind or nature was ever made of said citation upon the said George C. Burford, one of the defendants in error; and this appears from the face of the affidavit of the said E. M. Barnes found at said page 301 of the Record.

III.

That the judgment attempted to be appealed from, was and is a judgment rendered by the Trial Court in favor of all of the Defendants in Error (See pages 19 and 20 of Record).

IV.

That at the time of suing out said citation, and for a long time prior thereto, and for more than thirty days subsequent thereto, the said Jules B. Caro and Charles E. Hooker each had and maintained a home in the town of Juneau, as well as a business office for the transaction of a mercantile business which they were engaged in, and were present in said town at said time or times, so that personal service of said citation could have been made upon them and each of them, which more particularly appears by the affidavit of Jules B. Caro attached to and made a part of this motion.

V.

That the said George C. Burford was for several years prior to the commencement of the action a resident of the town of Juneau, Alaska, and attended the trial of the same, and was for some months prior to the suing out of said citation and for more than thirty days subsequent to the suing out of the same a resident of Valdez, Alaska, where personal service could have been made upon him of said citation if ordinary diligence had been exercised by Plaintiff in Error; all of which appears by the affidavit of the said Burford hereto attached and made a part of this motion.

WINN & BURTON and
HELLENTHAL & HELLENTHAL,
Attorneys for Defendants in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J.W. MARTIN, *Plaintiff in Error.*

vs.

GEORGE C. BURFORD, JULES B. CARO, ET AL.,
Defendants in Error.

No. 1712

AFFIDAVIT OF GEORGE C. BURFORD.

UNITED STATES OF AMERICA,
District of Alaska. } ss.

George C. Burford, being first duly sworn, on oath deposes and says:

That I am a married man and one of the defendants in error in the above entitled cause and that at the time of suing out the citation herein by the plain-

tiff in error, through his attorney, E. M. Barnes, I was residing at Valdez, Alaska, and had prior to that date resided with my family in Juneau, Alaska, for several years and was well acquainted with the people of Juneau and the said Barnes, and affiant verily believes that the said E. M. Barnes during the months of March and April, 1909, knew that affiant resided at said Valdez, or by the exercise of ordinary diligence could have found out the residence of affiant. That the said town of Juneau has cable connection with the town of Valdez, Alaska, as well as mails several times a month, both direct from Juneau to Valdez, and from Juneau via Seattle and Valdez, and during all of said time this affiant could easily have been reached and service of citation made herein, but that no service of the citation sued out in this case, of any name, nature or kind, was ever made upon affiant.

GEORGE C. BURFORD.

Subscribed and sworn to before me this 12th day of October, A. D. 1909.

JNO. R. WINN,

Notary Public in and for the District of Alaska.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. MARTIN, *Plaintiff in Error.*

vs.

GEORGE C. BURFORD, JULES B. CARO ET AL., *Defendants in Error.*

No. 1712

AFFIDAVIT OF JULES B. CARO.

UNITED STATES OF AMERICA,
District of Alaska. } ss.

Jules B. Caro, being first duly sworn, on oath deposes and says:

That I am a married man and reside in the town of Juneau, Alaska, and have resided therein for several years last past and have maintained my home there as well as an office, and that said Charles E.

Hooker, one of my co-defendants in the above entitled action, is a married man and has resided and maintained his home in the town of Juneau since the year 1902, and that the said Charles E. Hooker and myself have been engaged in the mercantile business at said town of Juneau, as J. B. Caro & Company, since the said last mentioned date; that I am well acquainted with the inhabitants and people of said town; that between the date of the citation sued out in the above entitled cause, to-wit, the 18th day of March, 1909, and the alleged date of mailing a copy of the same to myself and said Hooker, to-wit, April 3, 1909, both the said Hooker and myself were in the town of Juneau and were maintaining our residence there with our respective families as well as a business place and office in connection therewith, and saw E. M. Barnes, attorney for Plaintiff in Error, upon the streets in the town of Juneau daily.

JULES B. CARO.

Subscribed and sworn to before me this 12th day of October, A. D. 1909.

JNO. R. WINN,
Notary Public in and for the District of Alaska.

ARGUMENT ON MOTION TO DISMISS APPEAL

Section 11 of the Act of March 3, 1891, Chapter 517, 221 Stat. p. 829, in relation to time and proceedings for appeal or writ of error for review in the Circuit Court of Appeals provides, among other

things: "And all provisions of law now in force regulating the method and system of review, through appeals or writ of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error . . . ."

Subdivision 5, Rule 14, of the Circuit Court of Appeals, provides that a citation must be served before the return day thereof.

Rule 8 of this circuit also provides: "The practice shall be the same as in the Supreme Court of the United States so far as the same shall be applicable."

A service of citation is necessary to give jurisdiction.

Dayton vs. Lash, 94 U. S. 112.

In the case of *Tripp vs. Santa Rosa St. R. Co. et al.*, Vol. 12, U. S. Supreme Court Reporter, page 625, Mr. Chief Justice Fuller, speaking for the Court, says, in regard to writs of error, citations, etc: "Citation must be served on the party or his attorneys, if not in some manner personally waived by one of them; and the mailing of it to them is not sufficient although under the laws of the state that would be proper service," hence the mailing to J. B. Caro and Charles E. Hooker copies of the writ of error and citation is not good service; and this is the only service made or attempted to be made upon either of

them, as stated by Mr. Barnes in his affidavit at page 301 of Record.

As we understand the case of *Coler vs. Allen et al.*, 114 Fed. p. 609 (9th C. C. of A.) on appeal to this Court citation must be served on all of the parties who are interested or affected by decree or order appealed from.

In the case of *Faulkner vs. Hutchins*, 126 Fed., p. 362, the same doctrine is upheld, and the Court states: "A separate appeal by a single party from joint decree against him and others cannot be maintained without notice to the other defendants."

Hence, under these last authorities if this Court should hold that the mailing of a copy of the citation together with a copy of the writ of error in this case to Jules B. Caro and C. E. Hooker was sufficient service on them, yet there remains the question that no service of any name, nature or kind of the citation was ever made upon George C. Burford, one of the parties jointly interested in the decree or judgment sought to be appealed from.

Respectfully submitted for the reasons herein stated that the appeal, or the attempted appeal, of the Plaintiff in Error herein should be dismissed.

WINN & BURTON and
HELLENTHAL & HELLENTHAL,
Attorneys for Defendants in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. MARTIN, *Plaintiff in Error.* GEORGE C. BURFORD, JULES B. CARO, CHARLES E. HOOKER and J. B. CARO, Partners, doing business under the firm name of and style of J. B. CARO CO., *Defendants in Error.*	No. 1712

DEFENDANTS IN ERROR'S BRIEF ON THE MERITS

The above named Defendants in Error, not waiving their special appearance herein to dismiss said appeal, file this, their Statement of the Case, Brief and Argument upon the merits. Not having yet been served with plaintiff's brief, and being desirous

of presenting this cause upon appeal as we view it, and fearing misstatements in the statement of the case by plaintiff, we prefer to make our own statement rather than to admit the truthfulness or correctness of plaintiff's.

STATEMENT OF CASE BY DEFENDANTS.

The complaint of plaintiff alleges substantially that on the 28th day of August, 1905, he paid to the defendants herein the sum of Two Thousand Dollars ($2,000.00) and that this payment was evidenced by a receipt of the defendants, which receipt is set out in full in the complaint, the substance of which receipt is as follows:

"That George Burford and J. B. Caro Co. of Juneau, Alaska, in consideration of the sum of $2,000.00, in hand paid, etc., do hereby sell, transfer and assign unto J. W. Martin a one-third interest in the following property, to-wit: One scow, named Skagitt, her lines, gear, etc., one scow, Volunteer, her lines, gear, anchor, etc., one log float; seine boat and seines; sale barrels, tierces, salmon troughs and one store building and site, situated at Farragut Bay, Alaska; together with all things pertaining to the fishing outfit known as the Arctic Fishing and Packing Company, except a launch called Tillicum. And the parties of the first part hereby covenant that they are the owners and entitled to sell the one-third interest of all the above described property, which

said property is known as the said Arctic Fishing and Packing Company, and set over the same to the said second party; which said receipt is signed:

GEORGE C. BURFORD,
J. B. CARO & CO.
By CHARLES E. HOOKER,
J. B. CARO."

and witnessed by two witnesses.

"The plaintiff further alleges that in order to induce him to make the payment of $2,000.00 each of the defendants wantonly and falsely represented in said writing to plaintiff that they owned the store building and site as named in said writing, and were entitled to sell the same, and that this statement and the whole thereof was willfully false and was wantonly made by the defendants and each of them, and that the plaintiff relied on the truth of it and acted upon said representations; and that the defendants and each of them knew that the statement was false at the time it was made, and that it was made with intent to deceive the plaintiff, and that he suffered an injury and loss in the sum of $2,000.00. *That plaintiff was at the time ignorant of the truth or falsity of the statements and had no means of learning the truth or falsity of said statements, and that he would not have paid* $2,000.00, *or any part thereof, had it not been for his belief in the truth of the statement.* That the defendants, or neither of them, had at the time that the statement was made, or at any time, any title or ownership in and to the store building and site, and were not owners of it and not

in possession of the same and that they or either of them were entitled to sell said fishing site. And that by the said false statements above referred to the plaintiff had been damaged in the sum of $2,000.00, and that he claims exemplary damages in the sum of $1,000.00."

To this complaint the Defendant Caro interposed an answer stating substantially as follows:

First. Denying that he or any of his co-defendants had been paid the sum of $2000.00; denying that he ever executed and delivered to plaintiff the writing referred to in plaintiff's complaint as a receipt, or that he or any of his co-defendants wantonly or falsely, or at all, represented to the plaintiff that they or any of them owned a store building and site referred to in said receipt; and denying the remaining allegations of the complaint. Then an affirmative defense is set up in which Defendant Caro states in substance that on or about the 28th day of August, 1905, the defendant, George C. Burford, was the owner of a certain fishing outfit consisting of the personal property enumerated in the receipt which was set forth in the complaint; and that Burford at that time held an option on the store building and fishing site at Farragut Bay, referred to in the complaint. That at about this date Burford sold to the plaintiff a one-third interest in the entire fishing outfit, except the launch Tillicum, and that the plaintiff agreed to pay the said Burford the sum of $2,000.00 for such one-third interest; and that at the time the sale was made Burford explained to the

plaintiff in full that he (Burford) only had an option on the store building and Farragut Bay fishing site, and that if he exercised the right to take up the option that he, plaintiff, should become owner of a one-third interest in it as a part of the outfit purchased by the plaintiff; and that the purchase price of $2,000.00 would cover this one-third interest in said fishing site; and that before the plaintiff entered into the contract to purchase Burford fully and fairly explained to the plaintiff all the circumstances surrounding the title of the property and agreed to exercise the option to purchase the fishing site, and had a full and fair understanding with plaintiff without any concealment of facts, and said receipt was accordingly executed. That the firm of J. B. Caro & Co., which at that time consisted of Charles E. Hooker and Jules B. Caro, were at one time interested in the co-partnership known as the Arctic Fishing and Packing Company, and that some of the personal property mentioned in said receipt was formerly the property of the last mentioned company, and that the signature of J. B. Caro & Co. was attached to the receipt by Charles E. Hooker, one of the members of that firm, for no other purpose except to convey to the plaintiff whatever interest the firm at that time might have in the outfit conveyed by reason of their former ownership and interest in the Arctic Fishing and Packing Company, and that the signature of J. B. Caro & Co. was attached thereto for no other purpose whatsoever; all of which was known and understood by the plaintiff at the time of

the execution of the receipt in question. And the defendant, Caro, further states that he never signed the document in question and never authorized his individual name to be signed to the same; and that his name was affixed thereto by Charles E. Hooker, member of the co-partnership of J. B. Caro & Co.

That Martin agreed to pay for one-third interest in the fishing outfit and store building and site the sum of $2,000.00 to the said Burford, a small portion of which was paid in cash, the balance in notes given by the plaintiff. That immediately after the purchase so made by the plaintiff, said Burford left in charge with outfit to proceed to Farragut Bay as was contemplated between Burford and the plaintiff; and after Burford had lost considerable time and expense in attempting to go to Farragut Bay, was compelled by storm and heavy seas to put into an intermediate point known as Wrangell Narrows, for shelter and to save the outfit; and after putting in at Wrangell Narrows found out that the Pacific Coast Steamship Company, a common carrier of freight, running steamers upon Alaskan waters, and upon whose steamers the parties to the said fishing venture expected to ship fish taken in at Farragut Bay, would not call at said last mentioned place, and that no other steamers could be procured and it would make it impracticable and impossible to carry on the fishing business at Farragut Bay. That about this time the said Burford entered into a new parole agreement with the plaintiff by reason of the circumstances just narrated; and that it was agreed

between the said Burford and the plaintiff that they would abandon the Farragut Bay project and continue in the fishing business at Wrangell Narrows, and that the said Burford should not exercise his option in the purchase of the Farragut Bay building and fishing site, but that the plaintiff should nevertheless hold his one-third interest in the fishing outfit described herein, with the exeception, of course, of the building and site at Farragut Bay which was and had been valued by the said Burford and plaintiff to be worth no greater value than Two Hundred and Fifty Dollars ($250.00); and that thenceforth the said Burford and plaintiff were to be partners in the fishing outfit aforesaid, with the exception of the Farragut Bay property; and by way of settlement and adjustment of the differences existing between the two partners, and by reason of not proceeding to Farragut Bay, etc., and in consideration of the abandonment of that property, and the releasing of said Burford from his obligation to exercise said option and to convey a one-third interest therein to the plaintiff, that the plaintiff should be relieved from the payment to the said Burford of a certain outstanding promissory note of plaintiff for $500.00 which had theretofore been given by the plaintiff as a part of the purchase price of $2,000.00 above referred to, and that this agreement was entered into near Petersburg, Alaska, some one hundred miles distant from Juneau, and that the promissory note had been left by Burford at Juneau for safe keeping; and that the said Burford agreed that

said note should be canceled and should not be presented for payment in consideration of the facts here stated; and that the plaintiff would not demand a one-third interest in the Farragut Bay property; and by reason of other considerations and differences existing between the two parties at that time, and that by the cancellation of this note, all the differences existing between the parties should be adjusted and settled.

That the said Burford was at the time of the commencement of the action and at all times was ready to deliver and surrender up the $500.00 note to the plaintiff, and only had been prevented from doing so by reason of the note having been left at Juneau for safe keeping, and the note had never been presented for payment; and that the said Burford had carried out all the terms and conditions of the settlement and adjustment arrived at between himself and the plaintiff; and that the value of the Farragut Bay property was never any greater than $250.00; but owing to the fact that other losses had been incurred in the venture by the partnership, the cancellation of the $500.00 note was made to cover all such losses and miscarriages.

The plaintiff demurred to the answer of the Defendant Caro, and the demurrer was overruled and denied; after which a motion was filed by plaintiff to compel the defendant to make more definite and certain the answer in certain respects, which motion was granted and the defendant was given three days to amend by interlineation, which last right to amend

by interlineation apparently, from the Record, was never exercised, and is complained of later on by the plaintiff. A reply, however, was filed by plaintiff, denying all the affirmative matter set up in the Answer. (Record, pages 4 to 17 inclusive.)

At page 271 of the Record, near the bottom of the page, the Trial Court states that the answer of the defendant, J. B. Caro, had been accepted as the answer of all defendants by stipulation of counsel.

Upon the issues thus made up a jury was impaneled and the trial of the cause proceeded with, which trial resulted in a verdict for the defendants and judgment entered on the verdict in favor of the defendants for their costs and disbursements expended.

Such further proceedings were had that the plaintiff filed what purports to be an assignment of errors, which he relies upon for reversal of this cause upon appeal, and the errors complained of may be classified as follows:

First. Improper cross-examination of plaintiff by defendants' counsel respecting the value of certain items or pieces of personal property, and the fishing site described in the receipt which is set forth in the complaint. (Pages 25 to 31 of Record.)

Second. Improper cross-examination of plaintiff by counsel for defendants, concerning certain conversations had with plaintiff by defendants before the signing of the receipt set forth in the complaint pertaining to the kind or nature of the title that one of the defendants (Burford) had to the fishing site at

Farragut Bay; and the kind and nature of title that was intended to be conveyed to the plaintiff. (Pages 25 to 31 of the Record.) Also improper cross-examination of plaintiff as to the diligence used by him in ascertaining the kind or nature of the title he was getting to said fishing site. (Pages 25 to 31 of Record.)

Third. Testimony and evidence offered on the part of the defendants and admitted over the objections of plaintiff, as to the kind of title defendants were conveying, or intended to convey, in and to the fishing site to plaintiff; and conversations had in respect thereto between plaintiff and defendants at the time of making and signing the receipt set forth in the complaint; and also conversations had at that time between the said parties as to the value placed upon the fishing site and the items of personal property set forth in said receipt. (Pages 31 to 39 of Record.)

Fourth. Admission of evidence on part of the defendants over objections of the plaintiff as to the settlement of the matters of differences between Burford and plaintiff, set forth and referred to in the answer, which settlement was alleged to have been consummated before the commencement of this action. (Pages 31 to 39 of Record.)

Fifth. It is claimed that the Court erred in overruling the demurrer to defendants' answer. (Page 39 of Record.)

Sixth. It is claimed that the Court erred in al-

lowing defendants to offer proof under their answer without having complied with the order of the Court in making the same more specific and certain in certain respects. (Pages 39 and 40 of Record.)

Seventh. Plaintiff also claims that the Court erred in not giving certain instructions offered by him, which instructions are set out in full on pages of Record, 40 to 47, inclusive.

Eighth. Plaintiff also complains of instructions Nos. 11, 21, 22 and 23, given by the Court; which instructions are set forth in the Assignment of Error of plaintiff at pages 48, 49 and 50 of Record; as well as in the charge of the Court to the jury, set forth on pages 279 and 284 of Record.

ARGUMENT AND AUTHORITIES

The only thing that appears in the Record to show that a motion for a new trial was ever made in the cause and presented to the Trial Court, is the recital in the judgment as follows: "The motion for a new trial having been heretofore made, which said motion for a new trial has been by the Court, upon due consideration, overruled; now, therefore," etc. This being a jury case we contend that a motion for a new trial, setting forth the grounds relied upon for the granting of the same is necessary; and that the motion together with the order of the Trial Court made thereon, should appear in the Record. The Appellate Court should know whether or not the errors

complained of by appellant have been presented to the Trial Court and that Court had an opportunity to correct the same if any such have been made; and, as we understand it, until this is done and that Court refused to correct the errors, the Appellate Court will not grant any relief.

The petition for writ of error in this case states only that the appellant feels himself aggrieved by the judgment rendered and entered by the Trial Court on March 23, 1908 (Record, page 294) and states nothing concerning any motion for new trial or the denial of the same or any exception entered in respect to the Court's ruling in relation thereto.

The Assignment of Error of plaintiff in this case is novel both in form and substance, and we especially call the Court's attention to the same as it appears in the Record, pages 21 to 47 inclusive, and what the plaintiff calls Supplemental Assignment of Errors, pages 48 to 50 inclusive of Record.

We do not think that such an assignment of error is sufficient in law, nor does it comply with the requirements of the rules and practice of this Court. However, should this Court think that the Record in this case is such that the cause should be considered upon its merits and the assignment of error is sufficient for a consideration of the case upon its merits, we will proceed to demonstrate that the plaintiff had a fair and impartial trial and that the alleged errors complained of by plaintiff, after a fair consideration of the case, are harmless and not sufficient to war-

rant this Court making an order to set aside the verdict and granting a new trial; and we will present the case to the Court in the order set out in the statement of the case herein.

And the first error complained of is that of improper cross-examination of plaintiff by defendants' counsel respecting the value of certain items or pieces of personal property and the fishing site described in the receipt set forth in the complaint. The plaintiff was called to testify in his own behalf and his testimony is set out in full in the Assignment of Errors, pages 21 to 25 inclusive of Record; and after a few preliminary questions propounded to him by his attorney the receipt set forth in the complaint was identified as well as the signatures thereto, and it was offered in evidence. Then the plaintiff was asked the following questions by his attorney:

Q. I would ask you, Mr. Martin, how much, if any, you paid to the defendants on that agreement?

A. Two thousand dollars.

Q. Do you recognize that note (showing witness note)? *A.* Yes, sir.

Q. Now I would ask you if that note is a part of the $2,000.00 that you refer to? *A.* It is.

Q. If that note is returned to you and surrendered into your possession then I ask you how much you have paid to the defendants in money? *A.* Fifteen hundred dollars.

Q. Will you tell the jury how you came to pay

that money to the defendants? *A.* It was paid solely on the representations that they owned the site at Farragut Bay.

Q. Now, have you ascertained whether that statement was true or false? *A.* It proved to be false.

Q. At the time it was made tell the jury whether or not you had any knowledge of its truth or falsity? *A.* I had no knowledge—no way of gaining any knowledge.

Q. Tell the jury whether you believed the statement that was made to be true? *A.* I believed it to be true.

Q. Now, I would ask you, Mr. Martin, to state to the jury whether or not if you had any doubt as to the truth of these statements, you would have paid the sum of $2,000.00, or any part thereof? *A.* I certainly would not.

Q. How much damage do you claim, provided that the note is returned to you—that $500.00 note? *A.* Twenty-five hundred dollars.

Q. And of what does that consist, Mr. Martin? How much compensation for the loss you have sustained, do you desire? *A.* Fifteen hundred dollars.

Q. Then, how much damages as exemplary damages do you ask? *A.* One thousand dollars.

Q. Making altogether $2,500.00 instead of the $3,000.00 asked when you filed the complaint? *A.* Yes, sir. (Record, pages 23 to 25 inclusive.)

We may state here that the $500.00 note which the

witness was testifying concerning, is the canceled note referred to in the answer and was deposited with the Court and surrendered up to the plaintiff at the commencement of the trial. (Pages 53 and 274 of Record.)

The cross-examination of plaintiff complained of is set forth in somewhat of a garbled way (pages 25 to 31 inclusive of the Record), and the portion of this cross-examination which was objected to by plaintiff as improper cross-examination was those particular questions which were directed to the value placed upon the different items of personal property and fishing site referred to in the receipt, set forth in the complaint, at the time of the making of the receipt, and at the time that the plaintiff was purchasing a part interest in this property; and in the light of the foregoing direct examination, we contend that there was no error in the Court permitting the cross-examination complained of.

The plaintiff having testified that he had been damaged in an amount equal to the *entire purchase price of all the property* by reason of a failure to obtain his interest in *the fishing site*, it was surely proper cross-examination of plaintiff to find out from him as to whether or not the other property conveyed had any value and as to whether or not that he at the time of the purchase of the same, together with the defendants, placed a value on each item and piece of property intended to be conveyed. If the one-third interest in the personal property

which the plaintiff purchased had any value at all, then it was impossible, even considering the case from plaintiff's standpoint, for him to be damaged in the full purchase price paid for all the property by reason of not receiving his one-third interest in the fishing site. The cross-examination was clearly within the issues raised by the pleadings and was not cross-examination on immaterial or irrelevant matters. We therefore contend that the cross-examination was proper. Undoubtedly the plaintiff would have been compelled to have gone on the witness stand in rebuttal and contradicted denfendants' testimony in respect to these matters, and he (plaintiff) could not more successfully have done so than he did by answering the questions on cross-examination, for the reason that each answer made redounded to the benefit of the plaintiff and supported his theory of the case. The plaintiff was a hostile witness and the litigating party seeking to prove fraud on his adversary, and in such cases the Courts are very liberal in the matter of cross-examination. But should the Court be of the opinion that this was improper cross-examination of the plaintiff, it was not prejudicially erroneous; for, as stated above, from the very nature of the case he would have had to have been placed upon the witness stand in rebuttal; then such cross-examination would have been proper. Then the only departure in this case from the ordinary rule in such cases was in the matter of time at which the cross-examination was permitted. Nothing that appears from the Record tends to show that

the cross-examination was out of time, if it were out of time, that it worked any prejudice to the plaintiff nor can we conceive where he was prejudiced. This language is taken almost verbatim from the case of DeLissa vs. Fuller Coal & Mining Company, 52 Pac., page 886, and which case we claim is on all fours with the one at bar. The Court further states in referring to the cross-examination of the plaintiff in the DeLissa case, "We by no means wish to be understood as sanctioning the practice of parties in departing from the ordinary rule. It is doubtless true that in many cases the departure from the rule would result in prejudice, but none has been shown in this case." We do not think that plaintiff will be able in the case at bar to show from the Record or by authorities or argument any prejudice resulted from the cross-examination complained of.

This leads up to the consideration of the second and third classification of errors referred to herein, that is, improper cross-examination of plaintiff by counsel for defendants concerning certain conversations which defendants had with plaintiff before and at the time of signing the receipt in question and the sale of the interest in the property set forth therein, which conversations were as to title and value of the property intended to be conveyed, and, also, the introduction of testimony and evidence on the *part of defendants* to show that such conversations were had with plaintiff at the time or times mentioned above (pages 25 to 31 inclusive of the Record). First in the consideration of these al-

leged errors, we would call the Court's attention to some of the questions that were propounded to plaintiff on direct examination by his attorney in reference to the knowledge that the plaintiff had at the time of the purchase of the property of the title that he was purchasing. On page 24 of the Record we have the following:

"*Q.* Will you tell the jury how you came to pay that money to defendants? *A.* It was paid solely on the representation that they owned this site at Farragut Bay.

Q. At the time it was made (referring to representations) tell the jury whether or not you had any knowledge of its truth or falsity? *A. I had no knowledge—no way of gaining any knowledge.*"

Now, then, the cross-examination complained of simply sought to show that the witness *did have means of finding out about the title of the property,* and in fact, sought to show that he had had some conversations with the defendants, or some of the defendants, concerning this very matter. And in this connection, as well as in connection with the right of *defendants to offer on their part proof of these conversations* and the knowledge that plaintiff had of the title, we desire also to call the Court's attention to the third allegation of the complaint (page 5 of the Record), a portion of which reads as follows; in referring to false and fraudulent representations made by defendants, to-wit:

"Plaintiff was at the time (meaning the time of

the sale) wholly ignorant of the truth or falsity of said statements but believed the same to be true, and at the time plaintiff had no means of learning the truth or falsity of said statements."

In view of these facts, we do not see how plaintiff can successfully contend that there was any error in the Trial Court allowing the cross-examination in question or the introduction of the testimony and evidence *on part of defendants to prove the knowledge* that plaintiff had of the title and the conversations had in connection therewith at the time of the alleged transfer. We further contend in this connection that the paper writing set forth in the complaint, which plaintiff terms a receipt, evidencing the transfer of the property, is *nothing more or less than a receipt.* The best that plaintiff could claim is that it is a bill of sale, and a bill of sale does not embody the preliminaries or the essential terms of the contract in such a way as to exclude parole evidence.

Picard vs. McCormick, 11 Mich., p. 74.

The paper writing in question has not any covenant of warranty of title, hence the plaintiff has brought this action as one for deceit and false representations as to the title that defendants had to the fishing site and has evidently sought to plead matters not contained in the contract in order to endeavor to prove the deceit and false representations on part of defendants. We do not take it that the clause in the receipt, which reads as follows: "That they (re-

ferring to defendants) are the owners of and entitled to sell the one-third interest," etc., states a covenant of warranty; if so, it is nothing more than a limited one, and in an action for deceit and false representations where the paper writing evidencing the transfer is of the kind of the one in question combined with the allegations of the complaint, there is no question in our mind but what parole evidence was admissible to show what took place at the time of the execution of the paper to show the situation and intention of the parties concerned.

Wilson vs. Higbee, 62 Fed., p. 723.
Kimball vs. Saguin, 53 N. W., p. 116.
Ballou vs. Lucas, 59 Iowa 22, (12 N. W. 745.)

The plaintiff further claims error in the Trial Court permitting the defendants' counsel to cross-examine plaintiff while he was on the witness stand in his own behalf as to diligence used by him in ascertaining the kind or nature of title that he was getting to the fishing site (pages 25 to 31 of Record). For the reasons just above set forth, we are unable to see any error in this last matter complained of, and especially in view of the answer that witness made to the question above set forth, when referring to his relying upon the representations made by defendants in the purchase of the fishing site, he stated, "I had no knowledge—no way of gaining knowledge." The cross-examination complained of simply sought to show that plaintiff did have means of gaining knowledge as to the title he was purchasing and that

he availed himself of that opportunity and asked questions concerning the same and had conversations with defendants about this very matter. The law imposes upon the plaintiff, if the means of knowledge are equally open to him as to the defendants, the duty of ascertaining the facts and if he fails to do so, he is charged with knowledge of all that by use of such means he could have ascertained.

Reynolds vs. Palmer, 21 Fed., p. 433.
Slaughter, Admr., vs. Gerson, 13 Wallace, pp. 379-383; 125 U. S., p. 274.
Farnsworth vs. Duffner (S. C. R. 12, 164) 142 U. S. 48.
Mulholland vs. Washington Match Co., 77 Pa
Mulholland vs. Washington Match Co., 77 Pac. 497.
Grondrod vs. Anglo American Bond Co., 85 Pac. 891.

We now come to the consideration of the fourth subdivision of alleged errors, that is, that plaintiff claims that the Court erred in admitting evidence to show that one of the defendants herein, Burford, before the commencement of this action, settled the matters in dispute between plaintiff and defendants (pages 31 to 39 of the Record). We shall not consume any space in commenting upon this feature of the case further than to state that the matter of settlement and adjustment between the plaintiff and defendants of all matters out of which this action grew or upon which it is based is properly pleaded in the answer and evidence in support thereof was

admissible. The law encourages rather than prohibits settlements. And we contend in this case that it was established by great preponderance of the evidence that there was a settlement agreed upon and that the defendants complied with their part of the same by surrendering up plaintiff's five hundred dollar promissory note to him.

Fifth, it is claimed that the Court erred in overruling the demurrer to defendants' answer. We fail to see anything in this alleged error. It must be evident that the facts set up in the answer of the Defendant Caro, which was afterwards adopted as the answer of the other defendants, if true, would constitute a full and complete defense to all the matters complained of in the complaint.

In the sixth subdivision of errors, as set forth herein, it is claimed that the Court erred in allowing defendants to offer proof under their answer without having first complied with the order of the Court, in making the answer more specific and certain (pages 39 and 40 of Record). This is a matter entirely within the discretion of the Trial Court and not reviewable by the Appellate Court unless there is abuse of discretion, and we fail to see from the Records that there was any such abuse or that plaintiff was prejudiced by the action of the Trial Court in this respect, and we feel quite sure that plaintiff will be unable by argument or citation of any authorities in his brief to show to this Court that the ruling of the lower Court in this

respect was prejudicial error or furnishes any ground for reversal of the judgment herein.

In the seventh subdivision of error set forth herein, plaintiff claims that the Trial Court erred in not giving certain instructions offered by him. Some of the instructions offered and requested by plaintiff stated propositions of law which in the abstract were true, but did not apply to the facts in this case; others, while abstractly true, no attempt was made to apply the law to the facts of this case; others stated good propositions of law applicable to some facts in dispute, but not to all; some may have stated the law as applicable to the facts of the case, but in such instances we claim such matters were covered by the instructions given by the Court; other instructions offered were argumentative and some commented on the facts favorable to plaintiff and against the defendants; however, whatever may be the aspect of the case in respect to the instructions requested we state, without fear of being successfully contradicted, that it appears from an examination of the Record, pages 40 to 47 inclusive, covering the instructions offered by plaintiff, and the Record from page 270 to 285 covering the instructions given by the Court, that the refusal of the Court to give the instructions requested was not error, for the reason that each and every instruction offered by plaintiff which stated a proposition of law applicable to the facts and the case at bar, was covered in substance in the charge given by the Court. To corroborate our statement in this respect we will offer

no argument to the Court but respectfully call the Court's attention to the instructions tendered by plaintiff, and the charge of the Court given to the jury. If we are correct in this matter then no error was committed by the Court for not giving the instruction requested.

The eighth and last error assigned is the giving of instructions Nos. 11, 21, 22 and 23 by the Court which are referred to in plaintiff's Supplemental Assignment of Errors at pages 48 to 50 inclusive. It appears, however, that some portions of the instructions referred to are not correctly copied in Plaintiff's Assignment of Errors in the pages last above mentioned, and we call the Court's attention to these instructions as they appear in the charge of the Court to the jury on pages 279 and 284 of the Record. Instruction No. 11 complained of is excepted to by plaintiff, but no reasons given for such exception. We are at a loss to know why plaintiff claims that there was error in giving this instruction. It, in our opinion, is the law applicable to the facts in this case. The exception taken by plaintiff, not pointing out any error or stating any grounds for the exception, we do not think is sufficient. This instruction undoubtedly supports our theory of the case, and we think is supported by the authorities which we have cited in connection with other alleged errors.

Instruction 21 perhaps could have been omitted from the instructions of the Court for it is virtually

covered in instruction No. 11. It simply states: "That a bare naked statement made by defendants . . . *that they were the owners of a store building at Farragut Bay and entitled to sell the same unaccompanied by anything else, would not be sufficient to maintain plaintiff's action.*" This is true, for such a statement or allegation contained in a complaint, unaccompanied by the other elements or other essentials to constitute fraud or deceit mentioned in instruction 8, page 277, would be insufficient to state a cause of action; that is: (Ins. 8, p. 277)

First. That false and fraudulent representations must have been made to the plaintiff by the defendants or some one of them, and that the representations were material;

Second. That the defendants knew when they made the representations that they were false and fraudulent;

Third. That they were made with the intent to deceive the plaintiff and induce him to action;

Fourth. That he had believed said representations to be true and acted thereon;

Fifth. That he was actually damaged thereby. Instruction 21 construed together with this last instruction stated the law.

Instruction No. 22 simply states to the jury that if the plaintiff knew before the execution of the receipt or paper writing transferring title that Bur-

ford only had an option upon the fishing site in question, plaintiff could not recover, although the receipt or bill of sale provided that the defendants were the owner of and entitled to the store building and site. The same reasoning will apply to this instruction that applies to instruction 11. No one would contend that plaintiff could recover in this action if he knew these facts, for under such circumstances no deception, deceit or false representations could have been practiced upon the plaintiff, and the action would have been lacking in those particular essentials.

In regard to instruction 23 which appears to be a part of instruction 22 as given by the Court, we have no argument to make except as to refer the Court to the letter, Plaintiff's Exhibit No. 3, found at page 91 of the Record, and we think that the trial court was right in stating that this letter was not a warranty or a guaranty, but was simply a matter of opinion of one of the defendants and was written after the contract was entered into and could not form a basis of an action for deceit; and for these reasons it could have in nowise prejudiced the plaintiff. Counsel will not be permitted to select certain isolated instructions and state that error was committed by the Court by reason of giving the same; but they must be considered in connection with the entire charge given to the jury, and if the instructions taken altogether present the case fairly to the jury upon the law applicable to the facts, this is all that is necessary.

In the case at bar the instructions, considered as a whole, we contend fairly and impartially declare the law as applicable to the facts and the instructions complained of, construed with the entire charge to the jury and all instructions given, were not in our opinion prejudicial to the rights of the plaintiff.

By the reason of counsel for Plaintiff in Error refusing to serve us with their brief in time we are compelled to serve and file ours without first inspecting or seeing theirs.

We most respectfully submit that the verdict of the jury herein should be allowed to stand and the judgment of the trial court affirmed.

WINN & BURTON and
HELLENTHAL & HELLENTHAL,
Attorneys for Defendants in Error.

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NO. 1715

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

S. C. LILLIS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

H. H. WELSH, E. O. MILLER,
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Attorneys for Plaintiff in Error.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

S. C. LILLIS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 1715

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

This is a prosecution by indictment under the Act of February 25, 1885, (23 Stat., 321). This is the fence law passed by Congress in respect to inclosures of the public land. Section 1 of the Act makes any inclosure of the public land unlawful, where the inclosure has been made by an unauthorized person or persons or corporation; and the statute explains what such an unauthorized person or corporation is. Section 2 gives the Government a remedy against the unlawful inclosure by way of injunction, as in restraint and abatement of a nuisance. Section 3, in one category, forbids the obstruction of peaceable entry upon, or free passage or transit over or through the public lands, by unlawful fencing. The claim here is that Mr. Lillis made an inclosure of some public land in California, and that he did not belong to the class of authorized persons. The first count of the indictment (p. 9) imputes to him, as the primary and exclusive wrong doer, an unlawful inclosure of the land The second count goes against him "as part owner and

agent," on the same imputation. The third count imputes to him the obstruction of free passage and transit over and through the land, by unlawful fencing.

Looking at Section 1 of the Act a little more closely: It reads as follows— — — — —

> "*All* inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association or corporation — — — — —"

Now comes the description of the unauthorized persons or corporations, as follows:

> "To any of which land included within the inclosure, the person, party, association or corporation making or controlling the inclosure—
>
> (1) had no claim or color of title made or acquired in good faith,
>
> (2) or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States,
>
> at the time any such inclosure was or shall be made—"

Next comes the assignment of unlawfulness:

> "Are hereby declared to be unlawful and the maintenance, erection, construction, or control of *any such* inclosure is hereby forbidden and prohibited."

The statute, therefore, indicates a class of persons who may be described as authorized persons, and from

either of two points of view: First, they are authorized persons because, in respect to the inclosed land at the time when it was inclosed by them, they had a claim or color of title made or acquired in good faith; and second, because, in respect to the inclosed land at the time when it was inclosed by them, they had an asserted right by or under a bona fide claim with a view to entry thereof under the Public Land Laws. Persons not falling within the indicated class are unauthorized persons. As to them, all inclosures of the public land are unlawful. The motive, in their case, for making the inclosure, may be good, bad, or indifferent; but if they have made an actual inclosure, that inclosure is unlawful, irrespective of the motive for it. This stands out clearly if we read the statute, omitting the specification of authorized persons. It will then run like this:

> "*All inclosures* of any public lands heretofore or to be hereafter made by any person, are hereby declared to be unlawful, and the maintenance, construction, or control of any such inclosure is hereby forbidden."

So much for Section 1. Section 2 is concerned with the equitable remedy, and it need not detain us. Section 3 is addressed to the obstruction of free passage over the public lands, but, so far as this case is concerned, it goes upon the question of fencing, and unlawful fencing at that, as was held by this Court in the Potts case, 114 Fed., 52, 54. We may as well, for completeness, set it out: "No person, by force, threats, intimidations, or by any fencing or inclosing, or *any other* unlawful means, shall prevent

or obstruct or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the Public Land Laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands." The reference to fencing or inclosing, in this statute, folowed as it is by the expression, "or any other unlawful means," imports the legislative intent that such fencing or inclosing is an unlawful fencing or inclosing. And what an unlawful inclosure is, we have been told by Section 1 (Potts case, ubi, supra).

Now, it is believed that a grave error was committed by the Court below. There was a substantial controversy in the evidence, and the Court so recognized in its charge, over the inclosure itself—whether, indeed, Mr. Lillis had made an inclosure of public lands. The inclosure is a fact; but whether or not an inclosure has been made, is a question of fact; and at the trial below, that question of fact was contested, argued, and submitted to the jury.

But it went to the jury complicated with another question that had no place in the case. The Court below permitted the prosecution to put Mr. Lillis on trial, not simply for inclosing public land, where he did not fall within the class of authorized persons, but also for an alleged participation by him in some fraudulent homestead entries of public land, lying within the area said to be inclosed. It was charged by the prosecution that some employees of Mr. Lillis, working on land of his that adjoined the Government land in question, had attempted

fraudulent homestead entries of parts of this public land. At the time the fence, such as it is, was built, the public land on which, at a later period, these homestead entries had been attempted, was not open to entry; it had been withdrawn by the Department. The fence in question may have been an inclosure of the public land; but it may not have been an inclosure of the public land —it may have been a partial, limited and lawful construction, fairly related to the land owned by Mr. Lillis and to the purposes, pastoral or agricultural, for which he was using the land. That was an issue of fact, waged at the trial below. But whatever the character of this fence, whether an inclosure of public land or not, the public land in question here, at the time that fence was built by Mr. Lillis, had been withdrawn from entry and it lay with the Department to say when, if at all, the land should be thrown open to entry. Later, and after the fence had been standing for a substantial period, the land was opened to entry by public authority. Thereafter these alleged homestead entries were attempted. Whether they were made at the instigation of Mr. Lillis, or whether they were conceived and attempted without his privity or consent, and in aid of the purposes of his superintendent or foreman, or of any other person, was the sudden question injected into the case below and on which Mr. Lillis was put to his trial, and respect to which he was compelled, under those circumstances, to make such showing as he best might, in his own exoneration. The prejudice to him, before that jury of such an accusation, and the hardship upon him of meeting that new and sudden issue, are obvious enough. It is not too much to say

that he was tried, as a matter of indictment, for building and maintaining an inclosure of the public land, and was convicted of attempting, by the use of employees, to enter the public lands fraudulently under the homestead law. The reason given by the prosecution for putting in this kind of evidence, was, that it went to prove the motive of Mr. Lillis in making the alleged inclosure—that it was his intent to appropriate to himself this public land. But if Mr. Lillis was not in the class of authorized persons, his guilt or innocence, under the fence law, turned on the character of the inclosure; for the statute makes *all* inclosures unlawful except when made by the authorized persons. Why should Mr. Lillis be put upon trial on the unalleged and unnotified charge of conspiring to defraud the United States out of the title to public land when the only thing signified to him through the indictment was, that he, an unauthorized person, had made an inclosure of the public land, in respect to which the fact of inclosure was decisive, the question of intent or motive was immaterial? This point is prominent in the assignment of errors, and is a principal question in the case.

II

ASSIGNMENT OF ERRORS.

The assignment of errors will be found at pp. 582-608. Assignments 1, 2, 3, 4, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79,—all of these are pointed to the

action of the Court below in permitting the prosecution to go into this question of homestead entries.

The other assignments of error are addressed to some rulings of the Court at the trial (5, 6, 7, 8, 9, 10, 15, 64, 65, 66, 70,) and to the action of the Court in respect to the instructions (80-96); and to the action of the Court in denying the motion in arrest of judgment, and the motion for a new trial, and in rendering judgment on the verdict, and in pronouncing sentence (97-100). The sentence in this case was a cumulative one—fine and imprisonment, a fine of $1,000, and an imprisonment for six months. We now proceed to the discussion of the assignments, and first, to this question of homestead entries.

III

ARGUMENT.

1. The Court erred in making the question of homestead entries a part of the case. The trial Court instructed the jury on the question of inclosure as follows (p. 48):

> "An inclosure of land imports something more than an imaginary boundary line. There must be some visible or tangible obstruction, such as a fence, a ditch, a hedge, a precipitous bluff or something equivalent, for the protection of the premises against encroachment, and these obstructions, either singly or together, must surround and shut in the land on all sides. A person may make such an inclosure by keeping up fences on his own land, or by joining his fences to those of others, or he

may join his fences as above indicated to natural obstacles, such as ledges of rock, steep bluffs, declivities, or other natural obstructions not readily passable, or which, together with the fencing, would prevent or obstruct free passage to and upon the public land so inclosed. The inclosure need not be such as to absolutely exclude passage to or upon the land, but it is sufficient in this respect if it hinders and retards such passage."

Again, (p. 50): The Court told the jury:

"There is no hard and fast rule defining the number and size of openings in fencing surrounding public land that will enable the person maintaining the fence to escape the consequences of the statute. The exigencies of each case may be somewhat different, and a rule that would be properly applicable in one case might be wholly inapplicable in another. There might be evidence of physical conditions existing in one case that would warrant a jury in believing that gaps cut and wire gates made at reasonably frequent intervals would afford ample opportunity for access to and upon the land within the fence. On the other hand, there might be evidence of the existence of a physical condition where, by reason of the topography of the country, unless gaps were very frequent, there could be no access. Naturally a different rule would apply to conditions existing in mountainous or arid or sparsely settled countries from that which would apply to prairie countries or to productive or thickly settled areas. The jury, in

considering this question, should exercise their good common sense, remembering that in order to have compliance with the law, there should be that free access to the public domain which the law contemplates the citizens shall have a right to enjoy and remembering also that a man has a lawful right to fence his own land provided he does so without any intention or purpose of interfering with free access to public land."

It will at once occur to the Court that these instructions were responsive to the controversy at the trial over the question of fact, whether, indeed, Mr. Lillis actually made an inclosure of the public land, or whether such fencing as he actually did, was to a limited extent only, and in relation to his own land, regard being had to the uses to which he was putting this land. There will be no question made by the United States Attorney that the character of the fence, as matter of fact, was made a question in the Court below, and it was because of that question, and because the Court conceived that upon such question, the jury, under guidance as to the law, might find one way or the other, that the instructions just quoted were given. No review, therefore, of evidence on this point is necessary. Indeed, no claim was ever made by the Government that Mr. Lillis had put a ring fence around the Government land. Miles upon miles of boundary line were unfenced—great, open stretches of country. More than that, the evidence showed that Mr. Lillis had made serious and conscientious effort to arrive at a modus vivendi with the special agent of the Government in charge of the subject matter—at some adjustment of

the question as to whether such fencing as Mr. Lillis, an adjoining proprietor with the Government, found necessary to protect his land and cattle, amounted to an inclosure, in point of fact, of the public domain; that Mr. Lillis came to think that such an adjustment had been reached and that all parties were at one, and that any trouble over the fence had been averted. It was in view of this evidence that the Court said to the jury (p. 52): "If you believe from the evidence that prior to the date when it is alleged that these offenses were committed, the defendant consulted with Mr. Meyendorff, then the Government's special agent having supervision of the Government lands involved in this case, and that Mr. Meyendorff stated to the defendant that if the defendant would make certain changes in the fence in question and certain additional openings therein, he as such special agent would be satisfied with such fence, and permit its maintenance as a lawful fence, and if you further find that the defendant thereupon and prior to the date when it is alleged these offenses were committed, did make the changes and openings suggested by Mr. Meyendorff, and so maintained the fence down to the date charged in the indictment, then you are to consider these facts as determining whether the defendant acted in good faith in maintaining the fence."

It was therefore the character of the fence, as a physical fact, that was the matter of consideration and adjustment between Mr. Lillis and the agent of the Government. Mr. Lillis, as a large landed proprietor, whose holdings were contiguous to Government land, was seriously endeavoring, by proper fencing to preserve his

grazing land and his cattle from nomadic invasion and from loss or destruction. He was seeking an adjustment with the Government. He was in a position, as he is now in a position, to receive the fair consideration of the public authorities. It may not be inappropriate at this point to refer to the language of President Roosevelt in his Message of December 3, 1907, in which, speaking of the proposed revision of the land laws, he says:

> "Some such legislation as that proposed is essential in order to preserve the great stretches of public grazing land, which are unfit for cultivation under present methods and are valuable only for the forage which they supply. These stretches amount in all to some 300,000,000 acres and are open to the free grazing of cattle, sheep, horses and goats without restriction. Such a system, or rather such lack of system, means that the range is not so much used as wasted by abuse. As the west settles, the range becomes more and more overgrazed. Much of it cannot be used to advantage unless it is fenced, for fencing is the only way by which to keep in check the owners of nomad flocks which roam hither and thither, utterly destroying the pastures and leaving a waste behind, so that their presence is incompatible with the presence of home makers. The existing fences are all illegal. Some of them represent the improper exclusion of actual settlers, actual home makers, from territory which is usurped by great cattle companies. Some of them represent what is in itself a proper effort to use the range for those

upon the land and to prevent its use by nomadic outsiders. All these fences, those that are hurtful and those that are beneficial, are alike illegal and must come down. But it is an outrage that the law should necessitate such action on the part of the administration. The unlawful fencing of public lands for private grazing must be stopped, but the necessity which occasioned it must be provided for. The Federal Government should have control of the range, whether by permit or lease, as local necessities may determine. Such control should secure the great benefit of legitimate fencing, while at the same time securing and promoting the settlement of the country. In some places it may be that the tracts of range adjacent to the homesteads of actual settlers should be allotted to them severally or in common for the summer grazing of their stock. Elsewhere it may be that the lease system would serve the purpose; the leases to be temporary and subject to the rights of settlement, and the amount charged being large enough merely to permit of the efficient and beneficial control of the range by the Government, and of the payment to the county of the equivalent of what it would otherwise receive in taxes. The destruction of the public range will continue until some such laws as these are enacted."

The question, then, between Mr. Lillis and the Government, in these negotiations looking to an adjustment, was a question of fact, whether the fence as it stood was, in truth and substance, an inclosure of public land. If

that was its character, then it was an unlawful fence, and for the plain reason that Mr. Lillis had no right to make such an inclosure, and this again, for the equally plain reason that Mr. Lillis was not a member of the class of authorized persons. But the Court went beyond the statute, the indictment, and the issue, and instructed the jury as follows (p. 51):

> "The Court further charges you, that, in determining the good or bad faith of the defendant, that is, whether he maintained or controlled said fence to inclose his own land, or with the intention of inclosing public land, you may consider, together with the other evidence in the case, what efforts, if any, defendant made to acquire the title, occupancy or control of said public land by means of the homestead entries about which various witnesses have testified. You will bear in mind, however, that the evidence as to these entries was admitted by the Court solely for one purpose, and can be considered by you only for that purpose, namely: To throw light upon or illustrate the intention with which the defendant maintained or controlled said fence, and it is for you to determine what bearing and weight, if any, such evidence has upon said issue. If the defendant did not authorize the actions of his foreman, John Wright, with reference to said entry, or did not, with knowledge of what Wright had done and caused to be done, subsequently ratify Wright's actions, then, of course, the defendant is in no way responsible for said actions, and they cannot be

> further considered by you for any purpose whatever. In this connection, the Court further charges you that you may, and should, consider the fact, that all the Government lands included in said homestead entries were withdrawn from homestead entry on February 28, 1900, and that this order of withdrawal remained in effect until January 7, 1903."

This instruction notes the circumstance, which we have mentioned in passing, that the lands in question had been withdrawn from entry and that such withdrawal remained in effect for something like three years. The fence in question, such as it was, more or less, was begun in 1901 and finished in 1902—all during the period of withdrawal (p. 500). The instruction just quoted refers to the admission in evidence of the homestead entries, made or attempted by John Wright, or under his direction, and to the circumstnce that Wright was the foreman of Mr. Lillis. It thus appears that evidence was let in as to these homestead entries, imputable, at least in the first instance, to the foreman, Wright, and that Mr. Lillis was contesting the question of his alleged privity with such transaction. But he was put upon his trial for that very thing—for attempting, in every day English, to steal the title to lands of the United States. Indeed, this seems to have been made the prominent and overshadowing question. At pp. 113-114, the District Attorney says:

> "We propose to show that this defendant procured various persons who were in his employ to make entries upon various subdivisions of Gov-

ernment land which have been shown to be vacant and unoccupied during a period testified to by the witness; that he paid and caused to be paid all of the expenses of those witnesses: that he built and caused to be built the cabins erected on the homestead entries, or the property covered by the homestead entry, and wherever they were made; that in some instances he paid the parties compensation for that service, and in addition to which we propose to show that as to some of them he deposited or caused to be deposited at the Land Office within fourteen months after or at the expiration of fourteen months after the original entry was made, the amount of money necessary to commute, and was ready to put up the amount of money necessary for all of the parties then in condition to commute by reason of the lapse of time, some several thousand dollars; that he put up actually sixteen hundred dollars at that time, and somewhere in the neighborhood of thirty-five hundred dollars for the fees of the various parties who made the entries. That goes to two propositions, first it demonstrates a knowledge of the defendant, that he did have knowledge that this was Government land, the inclosed piece. It goes to show his purpose. And we expect to show also his own declaration to the effect that he desired to get control of all the land inside of this inclosure. That testimony we contend shows, or goes directly to the bona fides of the defendant in building this fence, shows that his purpose was not only to keep

other people off the land, but to obtain absolute dominion and control over it himself, and that he did it by corrupt means or attempted to do it. All of these entries were canceled at the Land Office by reason of the discovery of the fact which I have just indicated."

Of course, the suggestion that this evidence of alleged independent offenses was offered to show that Mr. Lillis knew the land in question to be Government land, is, it must be said with deference, a mere pretext, with which a Court should have little patience. But more than that, there was no question as to the knowledge of Mr. Lillis, and it was at once admitted by his counsel (p. 115) that Mr. Lillis had knowledge that this was Government land. (People v. Tucker, 104 Cal., 440, 443; People v. Sharp, 107 N. Y., 427, 476). And the knowledge of Mr. Lillis upon the subject at all, is beside the question: People inclose Government land at their peril, and want of knowledge is no defense under this statute. We are brought back, then, to the proposition that Mr. Lillis attempted, corruptly and fraudulently, to get title to the public land; and this alleged crime is offered to show his intent "in building this fence"—built when the land was not subject to entry—and when his intent in making the inclosure, if it could legitimately be illustrated in this way, is not a statutory quantity issuable in a case such as is sought to be made by the indictment.

Although the trial Court finally ruled this evidence in, it was not without apparent doubt and misgiving; for after argument of the question, the Court went on to say (pp. 116-117):

"This testimony, if put in the case, goes into numerous collateral issues; and, as I have already indicated, those collateral matters are never permitted by the Court unless they are clearly admissible. There are many reasons why they should not be admitted, among others, that the defendant has had no notice of these collateral issues, and of course cannot be prepared to meet them, has had no opportunity to meet them; and another objection is, that those collateral issues serve to obscure the main issue in the case, though sometimes they are proper and ought to be admitted. I will have to take this matter under consideration until tonight. I will call in the jury and let you go as far as you can, Mr. Lawlor, and examine this Potts case, after Court adjourns. Call in the jury. But for the Potts case, I would be prepared to hold myself that if a man on his own land builds a fence and that the natural and inevitable consequence of that fence is to inclose Government land, then that he violates the statute. A man is presumed to intend the consequence of his own act, and if he builds an inclosure that accomplishes that result, it would be my opinion that that constitutes an offense."

The foregoing sufficiently indicates, we think, the question raised without any extended review of the evidence of particular witnesses, and of particular rulings made. We content ourselves with referring to the testimony of the witness Stewart (pp. 179-193); to the testimony of Wright (pp. 193-261); again to the testimony of

Stewart (pp. 261-4); to the testimony of Cummings (pp. 265-271); to the testimony of Gonzales (pp. 271-4); of Dickerson (pp. 274-6); of Feliz (pp. 276-8); of Streeter (pp. 278-282); of Chester Dickerson (pp. 282-293); of Rodriguez (pp. 293-6); of Jones (pp. 296-7); of Ed Dickerson (pp. 298-301); of Lovelace (pp. 302-4); of Hall (pp. 305-8); of Lopez (pp. 308-311); of Melendez (pp. 311-313); of Ballard (pp. 313-315); of Martinez (pp. 315-17); of Rivera (pp. 317-318); of Beaver (pp. 318-20); of Gonzales, Wilson, Merz, Wright again (pp. 321-340); of McCord (pp. 348-352); of Beaver again, of Gonzales again, of Wilson again, of Charles Wilson, of Stewart again, of Mitchell (pp. 369-383); of Charles Dickerson again; of Flocker, and of Fellows (p. 391-6).

It is apparent, without any review of this mass of testimony, that the main and overspreading question of the case was this matter of fraudulent homestead entries. The real question in the case, made by the statute and the indictment, dwindled into an incident.

In the case of People v. O'Brien, 96 Cal., 173, the defendant was tried and convicted of the physical alteration of a public record, intended by him as a physical fact, but without any conscious or willful purpose to do violence to any law or to the rights of others. It was an ignorant alteration of a public record, without evil purpose. At page 176 of the opinion, the Supreme Court of California said:

> "The question presented is, whether it is necessary in making out the offense for the prosecution to show that the act was done for some sin-

ister purpose. It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit anyone to gainsay. It is expected that the jury and the Court, where it is shown that in fact the defendant was ignorant of the law, and innocent of any intention to violate the same, will give the defendant the benefit of the fact, and impose only a light penalty. (1 Bishop's Crim. Law, Sec. 2961; Wharton on Negligence, Sec. 411). The rule rests on public necessity; the welfare of society and the safety of the State depend upon its enforcement. If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration. The plea would be universally made, and would lead to interminable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exemption from liability. The absurdity of such a condition of the law is shown in the consummate satire of Pascal, where, speaking upon this subject, he says, in substance, that although the less a man thinks of the moral law the more culpable he is, yet under municipal law 'the

more he relieves himself from a knowledge of his duty, the more approvedly is his duty performed.' It is a familiar rule, that to constitute crime there must be a union of act and intent; but our code provides that 'the word 'Willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage! (Pen. Code, sec. 7). In Halsted v. State, 41 N. J. L., 552, 32 Am. Rep. 247, this subject was carefully considered and elaborately discussed. After reviewing the authorities, the court reached the conclusion stated in the syllabus, viz., that 'when an act, in general terms, is made indictable, a criminal intent need not be shown unless from the language or effects of the law a purpose to require the existence of such intent can be discovered. The question appertains to the department of statutory construction, and to introduce into the act the requisite of a guilty mind, *it must appear that such was the intent of the law-maker.*' In State v. McBrayer, 98 N. C., 623, the Court said: 'It is a mistaken notion that positive, willful intent to violate the criminal law is an essential ingredient in every criminal offense, and that where there is an absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, *the law*

implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation.' ''

Now, in the case at bar, under this fence law, the inclosure of the public lands—if in fact it amounts substantially to an inclosure—is unlawful, without reference to motive or intent, where the inclosure has been made by an unauthorized person. There is no room in such case for the exploitation of motive or intent. What the statute forbids is thereby made unlawful. This obvious view of the statute is sustained by express and pointed decision. In the case of United States v. Camfield, in the Circuit Court for the District of Colorado, 59 Fed., 562, the proceeding was by way of the equitable remedy, under section 2 of the Act, against the defendants for unlawfully inclosing public land. The case is thus stated:

> ''All the odd numbered sections in townships 7 and 8 N., range 63 W. of the sixth principal meridian, were purchased by the defendants from the Union Pacific Railway Company. The lands were incapable of successful cultivation without irrigation, as also were the adjoining lands, belonging to the United States. The defendants have undertaken to build reservoirs, to be supplied from the neighboring stream, for the irrigation of their own lands and the adjacent even-numbered sections belonging to the Government. The method which the defendants pursued to inclose the lands

> was to place a fence on their own—the odd-numbered—sections, along the lower line thereof, and dropping down about six inches, and continuing the line of fence on the odd-numbered sections in the tier of sections next below on the upper line thereof, making a continuous fence except at intervals where the break of six inches occurs."

It will be observed that while the fence was physically on the lands of the defendants—on the odd sections—yet there was no attempt to inclose the several odd sections by a quadrilateral fence, and the actual fence was built so near the even sections as to make it an actual inclosure of the public lands—as much so as if it had been moved a trifling distance in the direction of the even numbered sections so as to coincide with their boundary line. It was claimed by the defendants that the intent, in making the inclosure, was to protect an irrigation project established on their land but making as well for the benefit of the even numbered or public sections as for the benefit of the sections owned by the defendants. The Court held that the question of intent could not be raised, and that the inclosure of the public lands was an offense under the statute, and was the very offense created by the statute, regardless of the intent or motive with which the fence was built. The decision of the Court is as follows:

> "The Act of Congress of February 25, 1885, (23 Stat., 321) declares that any inclosure of public lands made without claim or color of title shall be unlawful, and confers jurisdiction on Federal Courts to abate and remove, in a summary way, all fences erected contrary to the provisions of the

Act. In this bill the Government seeks to enforce the Act with respect to certain fences erected by respondents, inclosing government lands in townships 7 and 8 N., of range 63 W., of the sixth principal meridian, covering an area of 20,000 acres. It is charged in the bill that respondents, owning odd-numbered sections in these townships and other townships adjacent, have erected a fence on their own lands in such manner as to inclose the even-numbered sections in townships 7 and 8, belonging to the Government. Respondents confess the fact to be as alleged, and say that the inclosure was made with a view to bring the lands under cultivation by building canals and reservoirs, from which they may be irrigated. As to respondents' intent we cannot inquire, for that is not, under this statute, a judicial question. *If the fence is forbidden by statute, we are not at liberty to inquire with what intent it was built;* and obviously the case is within the statute, which declares 'that all inclosures of public lands' shall be unlawful, without reference to whether the fence constituting the inclosure shall be on public or private lands."

The Comfield case went to the United States Circuit Court of Appeals for the Eighth Circuit, where the decision of the Circuit Court was affirmed in 66 Fed., 101. A full statement is made by the Circuit Court of Appeals of the case made by the bill and of the answer to the bill, and a township diagram is printed in the state-

ment of the case showing by dotted lines the course and construction of the fence. The opinion is as follows:

> "Thayer, Circuit Judge, after stating the case as above, delivered the opinion of the Court.
>
> "Section 1 of the act of February 25, 1885, supra, declared, in effect, that it should thereafter be deemed unlawful for any person, association or corporation, to make or maintain an inclosure which embraced within its limits any public land of the United States, to which the person making or maintaining the inclosure had no claim or color of title, and to which he asserted no right under a claim made in good faith, with a view to the entry thereof at the proper land office under the general land laws of the United States. The statute in question is general in its terms, and it contains no exceptions. It is within the power of Congress to enact such a law; and, having enacted it, it is not within the province of the judiciary to inquire or decide whether the measure was politic or impolitic, wise or unwise. The answer filed by the defendants admitted, in substance, that the defendants had caused an inclosure to be made which embraced within its limits more than 20,000 acres of the public domain. This admission brought them within the inhibitions of the law. *It matters not what their intention may have been in making the inclosure.* The courts charged with the enforcement of the law cannot say that the construction of a dam for purposes of irrigation is a work of such great utility and importance that, in the

execution of the same, the plain mandate of the statute may be diregarded. In support of their contention that the answer disclosed a good defense to the bill, we have been referred by counsel for the appellants to the case of U. S. v. Douglas-Willan Satoris Co., 3 Wyo., 288, 22 Pac., 92; but we cannot concur in the views expressed by the majority of the court in that case. We think that the defendants admitted that they had been guilty of a violation of the act of February 25, 1885, and that the facts pleaded by way of excuse do not amount to a justification of the unlawful act in the question. The decree of the circuit court of the United States for the District of Colorado is therefore affirmed."

The decision of the Circuit Court of Appeals for the Eighth Circuit was affirmed by the Supreme Court of the United States in 167 U. S., 518. The Supreme Court of the United States, in the opinion on appeal, sets forth the statute and then points out that inasmuch as the defendants were not within the authorized class, and did in fact inclose public lands, they are within the letter of the statute. No element of intent, therefore, is within the calls of the statute. The language of the Court is as follows:

"Defendants are certainly within the letter of this statute. They did inclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that they had any claim or color of title to the same, or any asserted right thereto under a claim made in good faith

> under the general laws of the United States. The defense is in substance that, if the Act be construed so as to apply to fences upon private property, it is unconstitutional."

The Court then proceeds to argue and to hold that legislation affecting the right to build fences upon private property, where such fences entail certain consequences in respect to the enjoyment of adjoining property, is subject to regulation by the Police power of the State. It is pointed out that the building of fences, not upon adjoining private lands, but upon the very public lands themselves, by the private citizen would be a trespass, open to abatement by the officers of the Government, or by the ordinary processes of the Courts, without the need of additional and affirmative legislation on the subject. "But," says the court, "the evil of permitting persons who owned or controlled the *alternate* sections, to inclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the Act of February 25, 1885, forbidding *all* inclosures of public lands and authorizing the abatement of the fences." The Court continues:

> "If the Act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all inclosures of public lands, by whatever means, that the Act becomes of any avail. The device to which defendants resorted

was certainly an ingenious one, *but it is too clearly an evasion* to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even-numbered sections, *they are manifestly intended to inclose the Government's lands, though, in fact, erected a few inches inside the defendants' line.* Considering the *obvious purposes* of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While

> we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the Police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation."

The Court then refers to the policy and practice of the Government in granting the public lands by alternate sections, to retain the even-numbered sections. "The law and the practice of the Government," the Court said, "was perfectly well settled, and if it had chosen in the past to permit by tacit acquiescence the pasturage of its public lands, it was a policy which it might change at any moment, and which became the subject of such abuses that Congress finally felt itself compelled to pass the Act of February 25, 1885, and thereby put an end to them. It was not intended, however, to prohibit altogether the pasturage of public lands, or to reverse the former practice of the Government in that particular. Indeed, we know of no reason why the policy, so long tolerated, of permitting the public lands to be pastured, may not be still pursued, provided herdsmen be employed, or other means adopted by which the fencing in, and the exclusive appropriation of such land, shall be avoided. The defendants *were bound to know* that the

sections they purchased of the railway company could only be used by them in subordination to the right of the Government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and *were bound* to avoid obstructing or embarrassing it in such disposition."

The Supreme Court of the United States, therefore, holds in this case that the actual inclosure of the public lands, without more, where the person making the inclosure is not a member of the authorized class, falls within the very letter of the statute; that the mere circumstance that the physical fence is not on the public lands, but upon private lands, where the fence is built so near the public lands as to be practically coincident with the boundary line, may be indicative of an ingenious device, but such a fence, from the point of view of a private structure, is purely colorable, obviously so, and the Court will not shut its eyes to the plain fact, apparent on the physical situation, that an actual inclosure of the public lands has been made; and finally, the mere item of fact that such a fence, being what it is, rests physically on private land, will not withdraw it from the constitutional interference of Congress, and it remains subject to the police power of the Nation. This is the scope and effect of the decision of the Supreme Court of the United States.

Now, then, two points were made to the Supreme Court, one upon the questin of the right and consequence of separate fencing of the several alternate sections, an, other on the question of intent. As to the first point, the Court Said:

"It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the Government from the even-numbered sections, since this was a contingency which the Government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, *under the guise* of inclosing his own land, he builds a fence *which is useless for that purpose*, and can *only* have been intended to inclose the lands of the Government, he is *plainly within the Statute*, and is guilty of an unwarrantable appropriation of that which belonged to the public at large. It may be added, however, that this is scarcely a practical question, since a separate inclosure of each section would only become desirable when the country had been settled, and roads had been built which would give access to each section."

The fence, then, is the thing to look to. Is that fence, as it stands, a private inclosure, really useful for inclosing private property, or is it, as it stands, useless for that purpose, a mere device, and obviously an inclosure of the contiguous public lands? This is a distinction, made by the Supreme Court of the United States, which

illuminates the Potts case, 114 Fed., 52, and indeed, upon which the Potts case, as we read it, is made to turn. But it is a far cry from this distinction to the letting in of wholly distinct and independent offenses for the purpose of imputing a sinister intent to the defendant, quite beside any question as to the physical character and relations of the fence.

And now, for the second point, for this matter of intent. The defendants in the Camfield case avowed a good and beneficial intent and purpose, just as here, per contra, the Government would impute evil and fraudulent practices. The Supreme Court said:

> "It is equally immaterial that the defendants have undertaken to build large reservoirs for water to be supplied for the irrigation of its land, or that they have proceeded in accordance with the Act of Congress in acquiring the necessary sites to be used in the construction of such reservoirs, or that they have expended large sums of money in providing for this improvement. If they have *inclosed the public lands* in violation of the statute, it is no answer to say that they have inclosed them for irrigating as well as for pasturage *purposes*. The violation of the statute is none the less manifest from the fact that the defendants had an *ulterior purpose*, or a *purpose* other than that of pasturage."

The Potts case was decided March 3, 1902, after the Camfield case had gone to final judgment. The land was in Spokane County, Washington, in Townships 19 and 20

North, Range 38 East of Williamette Meridian. Potts was the owner and lessee respectively of two sections in Township 20, namely, Sections 25 and 36. Section 36, as the Court will at once observe, is in the lower right hand corner of the township; section 25 is just above it and adjoining it. The two sections, therefore, make a rectangle two miles long, north and south, and one mile wide, east and west. Potts built a quadrilateral wire fence inclosing this rectangle. The County road meanders along the east side of this rectangle and of the sections above the rectangle, also in township 20, and of the sections below the rectangle, these lower sections being in Township 19 North. Now, the Government owned some land in these two townships. It owned the northwest quarter of Section 2 in Township 19. This quarter section does not adjoin the Potts rectangle, but, at its nearest point, is half a mile away. The Government also owned the southwest quarter of Section 26 in Township 20; and this quarter section, at its nearest point, is half a mile removed from the Potts land. The Government also owned all of Section 34 in Township 20 and this section, at its nearest point, is half a mile removed from the sections of Potts. As the county road lies on the east boundary of the Potts land, and as this Government land is west of the Potts land, it follows that the Government land is distant from the county road not only by its distance from the nearest point, or western boundary of the Potts land, but by the additional interval measured by the width of this Potts land from western boundary to eastern boundary. A man going from the county road to the Government land would walk a

mile and a half to the proximate boundary of either of the two Government quarter sections, and he would walk two miles to the proximate boundary of the full Government section, number 34. There were private owners of the sections in Township 20 just to the north of Potts; so also as to the Sections in Township 19 just south of Potts. These other owners had inclosed their several sections with quadrilateral fences, just like Potts; and therefore the Potts fences, joined as they were to the fences above him and to the fences blow him, made a barrier between the county road and this Government land that we have been speaking of. And it was this barrier, and only to the extent of the Potts part of it, for which the Government prosecuted Potts, as having made and maintained an inclosure of the public land. But Potts had made a real and useful, not a useless and colorable, inclosure of his several sections; and that was precisely what he had a right to do according to the Supreme Court of the United States in the Camfield case, even though inconvenience of access to Government land had intervened. There could have been but one question in the Potts case—whether he had made a real and useful inclosure of his private sections, or had erected a colorable fence useless for purposes of private inclosure, and, as it stood, an obvious inclosure of public land. This Court said on the proceeding in error, that Potts was entitled to have that question go to the jury, and that his case had been a mistrial in the Court below, because that Court took the question from the jury, and held that the barrier, such as it was, contravened the provisions of the statute. This was the Potts case. It certainly is no au-

thority for the admission of an alleged series of distinct and independent offenses; it was not written to overrule the Circuit Court for the District of Colorado in the Camfield case, nor the Circuit Court of Appeals for the Eighth Circuit, in the same case; nor to make any deviation from the rule of construction and decision of the Supreme Court of the United States in the Camfield case. Indeed, the Potts case quotes the Supreme Court of the United States in the Camfield case, and upon the point to which we have adverted already.

It is said in the Potts case:

> "The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when, under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing the public lands of the Government, that the fence or inclosure becomes unlawful. This is the law as declared by the Supreme Court in the case of Camfield v. U. S., 167 U. S., 518, 17 Sup. Ct., 864, 42 L. Ed., 260. In that case the defendants had acquired the right to use all the odd-numbered sections of land lying within certain townships, and built fences around the boundary lines of the townships. *By an ingenious arrangement of crossing the township boundary line at each section line, the fence was constructed entirely upon the odd-numbered sections, and was thus located entirely upon the land*

of the defendants, though completely surrounding and inclosing the even-numbered sections belonging to the Government. The Court held the defendants' action to be within the letter of the statute, as actually inclosing public lands without any color of title to the lands, and that the fence was therefore a nuisance, subject to abatement by the Government, under the act of February 25, 1885. But the Court said, in the course of its opinion:

> 'It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the Government from the even-numbered sections, since this was a contingency which the Government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large.' ''

After having thus quoted from the Camfield case, the Court proceeded:

> "In the case at bar, however, the evidence tends to show that *no public land had actually been inclosed by the fence of the defendant alone.* He had, it appears, constructed a fence *around* two sections of his own land. This land is situated between certain public lands and the county road. Other owners of land in the vicinity had formerly fenced their holdings, apparently without complaint from the Government or adjoining settlers The fence of the defendant, connecting with the fences of the other owners, had formed a chain of fences which presented a barrier between the public land in question and the county road. It is evident that this portion of the country is not well populated, and the public roads are few, as the greater part of the public land claimed to be unlawfully inclosed by the fence in question is two miles from the county road. Upon this evidence, it was clearly the duty of the Court to submit to the jury the question whether the defendant's fence or inclosure was erected by him in good faith *to inclose his own land,* or whether, *in joining his fence to that of others,* it was his intent and purpose to prevent or obstruct any person from peaceably entering upon, or establishing a settlement or residence upon, the tract of public land described in the indictment."

It is very clear that the "purpose" of defendant is referred by the Court to the physical situation as made by

defendant's inclosure as related to his own land and by the juxtaposition of such inclosure with the fences of his neighbors. The point was whether the fence of defendant was an actual inclosure of his own land, or whether, as that fence stood, it was merely colorable so far as inclosing defendant's land was concerned, and was really an inclosure of the Government land. The Court was making the point and was taking the distinction, made and taken in the Camfield case. It was not decided in the Potts case, nor was it meant to be decided, if we apprehend the language, that any criminal intent is a part of the statutory offense or of the Government's case, or that anything more is included in the statute than the making of an actual inclosure of Government land by an unauthorized person. The Court held that the instruction of the trial court to the jury that a fence—a quadrilateral fence, it was—built by a person upon his own land was unlawful, if in effect it inclosed and shut out the public from any part of the public domain—was too broad, as a statement of the law on the subject. And this conclusion was drawn, and, as it would seem, inevitably, from the reasoning of the Supreme Court of the United States in the Camfield case.

The case of Armour v. U. S., 209 U. S., 56, 85, was concerned with an interstate shipment made at a rate less than the published tariff as of the time of the shipment, but which had been fixed by a previous contract, still current, in which the conventional rate, as of the time of the making of the contract, was also the legal rate. The Court held that the case was ruled by the pub-

lished rate as of the time of the shipment, and that any contract rate must be taken to have been made subject to the possible change of the published rate in the manner fixed by statute, to which the shipper must conform or suffer the penalty fixed by law. (209 U. S., p. 82). At page 85, the Court said:

> "It is contended by the petitioner that there is nothing in the facts found in this case to show any intentional violation of the law; that on the contrary the petitioner believed itself to be within its legal right in insisting upon the performance of its contract, and maintained in good faith that the Interstate Commerce Act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case. While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, *where purposely doing a thing prohibited by statute* may amount to an offense, although the act does not involve turpitude or moral wrong. In this case, the statutes provide it shall be penal to receive transportation of goods at less than the published rate. Whether shippers who pay a rate under the honest belief that it is the *lawfully established* rate, when in fact it is not, are liable under the statute because of a *duty resting on them* to inform them-

selves as to the existence of the elements essential to establish a rate as required by law, is a question not decided because not arising on this record. The *stipulated facts* show that the shippers had *knowledge* of the rates published and shipped the goods under a contention of their legal rights so to do. This was all the knowledge or guilty intent that the act required."

While the case just cited arose under the statute regulating interstate commerce, the citation is made to the point that where a statutory offense has been created as, for instance, the making of an inclosure of public land "purposely doing the thing prohibited by statute amounts to a breach of the law without reference to the moral quality of the act involved. When the unauthorized person makes the inclosure, he does what the statute forbids, and the statutory intent is at once imputed. It is in the nature of a conclusive presumption. To this extent only, and not in a general sense, is the question of intent at all involved. The issue in the case at bar as to the homestead entries was a colorable issue, and evidence thereon was wholly inadmissible.

In People v. Sharp, 107 N. Y., 427, the defendants had been indicted for offering a bribe to one of the members of the Common Council of the City of New York for the purpose of influencing his action on the application of the Broadway Surface Railway Company, for a street railroad franchise, on Broadway Street, New York City. The trial Court admitted evidence against the defendant Sharp that he had offered a bribe, prior to the commis-

sion of the offense alleged in the indictment, to the engrossing clerk of the New York Assembly for the making of an alteration in a street railway bill then pending before the Legislature, so as to include in the terms of the bill an authorization for the construction of a street railroad on Broadway street, New York City. The Court of Appeals held that the admission of this evidence was error.

The opinion of the Court of Appeals, 107 N. Y., at page 457, quotes from the argument of counsel for the prosecution in respect to the admissibility of this evidence against the defendant Sharp; and that argument ran as follows:

> "Evidence was offered to show that not long before, he had attempted to bribe another official person to do an act which, as he thought, would promote the scheme which he had so long pursued. This evidence being given proved beyond a question that no sense of right and wrong, no fear of law or punishment would deter him from committing the offense of bribery for the one purpose which he had in view in all his efforts."

At page 458, the Court, by Danforth, J., said:

> "The indictment is all that the defendant is expected to come prepared to answer. Therefore the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise, and do him manifest injustice by creating a prejudice against his general character."

And again at page 460:

"If it had been proven that Sharp had in fact given the money to Fullgraff (the member of the Common Council) and the question was as to its being an innocent or criminal act, a gift which he had a right to make, or which he made corruptly, the fact, if it were a fact, that he sought to attain a similar end by bribery, might seem to show the intent with which the act charged was done. *But here the very thing in dispute was whether he gave the money*, and that, upon a former and different occasion, he had offered money with a guilty purpose to another person, could not fairly be held as relevant to that question. Moreover, it had been distinctly conceded by the defendant that he desired to secure the franchise for the Broadway Surface Railroad, and, therefore, evidence of his commission of a crime for the mere purpose of showing that desire, was wholly unnecessary, and we may repeat here the language of Allen, J., in the Coleman case, 55 N. Y., 81, upon a similar question: 'It was idle and frivolous to put in this evidence for the purpose avowed, while its influence could not be otherwise than damaging to the prisoner.'"

And again:

"Such evidence is uniformly condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice and mislead them."

In the opinion in the same case by Judge Peckham, afterwards Mr. Justice Peckham of the Supreme Court

of the United States, it is said, speaking of the payment of the money to Fullgraff (p. 469):

> "The fact being established that such payment was made, and that the defendant was connected with its payment, the intent could not be a matter of any real doubt. That it was paid to obtain the vote of Fullgraff as an Alderman for granting the franchise to the Broadway Surface Railway, could not be made a subject of honest discussion. All the evidence was to that effect, and there was absolutely no evidence to the contrary, and to offer evidence of the commission of another crime for the avowed purpose of thereby showing the intent with which this money was paid to Fullgraff would have made to my mind a clear case of offering it on a colorable issue, and using it for another and wholly inadmissible purpose. However that may be, the evidence was not admissible even on the question of intent."

At page 470 Judge Peckham said:

> "It is a very general and extremely broad, and I think a dangerous ground, upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was so desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me that this is nothing more than an attempt to show that the defendant was capable of committing the crime alleged in the indictment, because he had been will-

ing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime, is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place, and to accomplish the commission of another act. It throws light upon that intent only as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial."

Further, at page 473, and proceeding, it will be remembered, on the assumption that criminal intent was a factor of the offense charged, Judge Peckham, speaking of the collateral bribery, says:

"At the time of its alleged occurrence, no law had been passed. It did not appear and could not appear that at that time any law ever would be passed."

This is somewhat reminiscent, it may be interjected, of the withdrawal of the lands in the case at bar, from homestead entry, when the fence in question was built. Judge Peckham continues:

"It was an act remote in point of time, different in purpose, and of an entirely separate and distinct matter, forming no part of one main transaction, and to my mind coming no where near

See, also, on this subject recent case of People v. Glass, 122 Pacific Reporter, 231, et seq.

issibility of such evi-

cases which I have

am says:

"Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions creates a prejudice which may cause injustice to be done him."

And finally, at the same page, Mr. Justice Peckham goes on to say:

"Upon the same basis, it is difficult to see the materiality or admissibility of the evidence that the prisoner, after the passage of the Act of 1884, paid to Phelps the $50,000 as testified to by

> Phelps. The evidence, it can be seen, had a tendency to greatly prejudice the prisoner upon the issue of his guilt of bribing Fullgraff, while wholly inadmissible for any such purpose, and it would seem to be quite questionable to admit it for the purpose of proving an interest in a Broadway railroad about which there could be and was no dispute or contradiction. We call attention to the question without absolutely deciding it."

It is therefore respectfully submitted to this Court of Appeal, that grave and prejudicial error was committed by the trial Court in permitting this matter of homestead entries to pass into the case.

IV.

The Judgment should have been arrested, (Assignments 97, 99, 100, pp. 607-608).

The statute, as we have noticed, excepts the members of an authorized class from its purview. The indictment makes the attempt to negative the exceptions—in the first count at page 11, in the second count at page 14, in the third count at pages 15-16. Our point is that the exceptions must be negatived, and that the attempt in that direction was ineffecive; that by consequence the indictment is insufficient, and the judgment should have been arrested.

The opinion in U. S. v. Churchill, 101 Fed., 443, is brief and to the point:

> "De Haven, District Judge. The defendant is charged with unlawfully and knowingly maintaining a certain inclosure of public lands of the Uni-

ted States, in violation of section 1 of the act entitled 'An Act to prevent unlawful occupancy of the public lands,' approved February 25, 1885 (23 Stat., 321). The indictment is fatally defective in not charging that at the time the alleged unlawful inclosure was made or erected the defendant or other person who constructed the same had no claim or color of title to any of the public land inclosed, 'made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general land laws of the United States.' The demurrer will be sustained."

It will be seen at page 11, at page 14 and at pages 15-16, of the record, that there is no direct and positive statement negativing the exceptions, that any attempt in that direction is wholly by way of recital or inference. The language at page 11, first count, is as follows:

"The said S. C. Lillis, so constructing, maintaining and controlling the said inclosure, then and there having no claim or color of title made or acquired in good faith, or otherwise, or at all, to any of said described public lands of the United States, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office of the United States, to-wit, the United States Land Office at Visalia, in the County of Tulare, State, Division and District aforesaid, under the general laws of the United States."

Similar language is used at page 14, for the second count. At pages 15-16, the language for the third count is as follows:

> "He, the said S. C. Lillis, then and there and at the time of so preventing and obstructing, having no claim or color of title to any of said described lands, or any part thereof, made or acquired in good faith, or any asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office of the United States, to-wit, the United States Land Office at Visalia, in the County of Tulare, State, Division and District aforesaid, under the general laws of the United States."

It is plain, from this language of the indictment, that the negativing of the exceptions, essential to the sufficiency of the pleading, is not by direct and positive statement; it is wholly by way of recital and implication. More than that, there is a total failure, even by way of recital or implication, to negative the exception which goes upon an asserted right by or under claim made in good faith with a view to entry thereof at the proper land office of the United States. There is a recital in respect to "having no claim or color of title," but the negation is not carried into the second exception which goes upon the "asserted right." The negative is wholly omitted. The language is affirmative—"*or an* asserted right." Putting the recital together, as addressed to both exceptions, it reads: "*Having no* claim or color of title made or acquired in good faith, or otherwise or at all, to any of said

described public lands of the United States, or (having) an asserted right" etc. It is impossible to interpolate the negative, after the conjunctive or, and before the term "asserted right," whether before or after the article "an." The pleader instead of negativing the "asserted right," has affirmed it, by way of recital or implication, and it is only by way of recital or implication that he approaches the exceptions at all. All this is just as true of the second count at page 14, and of the third count at pages 15-16.

It is well settled that the essential elements of an indictment must be set forth in direct and positive form, and it is just as well settled that omissions cannot be supplied by intendment or implication.

Pettibone v. U. S., 148 U. S., 197;

U. S. v. Post, 113 Fed., 854;

U. S. v. Hess, 124 U. S., 486;

U. S. v. Statts, 8 How, 41, 44;

In re Wolf, 27 Fed., 606, 611;

In re Corning, 51 Fed., 205, 210.

In People v. Dunlap, 113 Cal., 72, 75, it was said:

> "It is requisite to the sufficiency of the indictment that it shall state every fact and circumstance which is essential to constitute the offense charged, and that the statement of every such fact and circumstance be direct and positive. The want of such direct and positive statement cannot be supplied by any intendment or implication, and, if stated merely argumentatively or by way of recital or inference, it is insufficient."

In People v. Cohen, 118 Cal., 74, 79, the Court said:

> "Every fact and circumstance necessarily stated in an indictment must be laid positively; that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances. It cannot be stated by way of recital, that whereas, etc., or the like. The want of a direct allegation of anything material in the description, substance, nature, or manner of the offense cannot be supplied by any intendment or implication whatever."

In People v. Jones, 123 Cal., 299, 301, it is said:

> "Direct and positive averments of the fact cannot be supplied by any intendment or implication, and where stated argumentatively, or by way of recital or inference, it is insufficient."

And in People v. Turner, 122 Cal., 679, 681, it was said of such expressions as willfully, corruptly, and the like:

> "The language is but a mere conclusion of law and does not avail to cure the defect in the charging part of the indictment."

And by the Supreme Court of the United States in Pettibone v. U. S., 148 U. S., 197, 202, it was said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated; and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be

made directly and not inferentially or by way of recital."

The indictment is therefore bad. It does not seem to have been drawn upon full consideration. Indeed, the third count is bare of any facts. Its epithets, "willfully and unlawfully," are not helpful (People v. Turner, supra). To quote the language of U. S. v Cruikshank, 92 U. S., 542, 557:

> "Every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars."

It is respectfully submitted that the judgment herein should be reversed.

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United States Circuit Court of Appeals

For the Ninth Circuit

S. C. LILLIS, Plaintiff in Error;
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 1715

BRIEF OF DEFENDANT IN ERROR.

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S. C. LILLIS, Plaintiff in Error;
vs.
UNITED STATES OF AMERICA,
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No. 1715

BRIEF OF DEFENDANT IN ERROR.

I.

Statement of the Case.

In the year 1901 S. C. Lillis, plaintiff in error, being extensively engaged in the business of raising cattle, sheep and horses, began, through his Foreman John S. Wright, the construction of a fence around a vast body of land situated in the western part of Fresno County, California (Page 203). This fence was made of posts and barbed wire. It was over fifty miles in length, and, in conjunction with a natural barrier on the west side (Pages 147, 148 & 149), enclosed an area of 175 square miles of land. The building of this fence extended over a period of about two years, having been completed in the latter part of the year 1902, or the first part of the year 1903 (Pages 123, 202, 361, 363, 365).

The plaintiff in error leased from the Southern

Pacific Company some sixty or seventy sections of land within the enclosure. He also acquired a portion of said land by purchase. In addition to the land owned and controlled by him within the enclosure there was also some 32,000 acres of public land belonging to the United States.

The plaintiff in error was indicted, tried, and convicted for maintaining an enclosure of the said public lands, and, by means of said fence, preventing and obstructing free passage and transit over and through the same. The fence extended along the south, the east, and the north sides of the land enclosed. On the west side of the land enclosed the enclosure was completed by mountains, gulches, declevities, thick brush and other natural obstructions.

Approximately at the date of completion of the fence the plaintiff in error informed his Foreman that he desired to acquire possession of all of the land within the enclosure that he could, and instructed his Foreman to secure such land for him (Pages 209, 210, 211). Among other duties of the foreman were the keeping of himself informed upon the titles of the various tracts of land within the enclosure and the advising of the plaintiff in error of the conditions of and changes in such titles (Pages 205, 250). The plaintiff in error frequently visited the land within the enclosure and remained there as long as a month at a time (Page 253). On the occasion of those

visits he would ride over and examine the ranch, and would discuss with his Foreman the matter of titles to the lands within the enclosure, and would see upon such lands at various places small cabins erected by persons who had made homestead entries on the public lands within the enclosure at the expense of the plaintiff in error and the procurement of his Foreman (Pages 231, 232, 252). The Foreman and the plaintiff in error had maps of the lands within the enclosure showing the condition of and changes in the titles to the various tracts of said lands, and those maps were constantly referred to, discussed and marked by the plaintiff in error and his Foreman (Pages 202, 203, 247, 248, 249, 253).

Almost contemperaneously with the completion of the fence, the Foreman began to hire and procure various ranch employes, vaqueros and persons whom he could procure in the neighborhood and nearby villages, and to take them to the United States Land Office at Visalia, California, to there have such persons make homestead entries of various tracts of said public lands located within the enclosure (Pages 184 to 191—208 to 323).

Plaintiff in error was the President of the First National Bank of Lemoore, located at Lemoore, California, (Page 325). He maintained an account with that bank and his Foreman was authorized by the plaintiff in error to draw checks

against that account (Pages 325 to 330). The plaintiff in error frequently visited the bank and there examined the account, so checked against by his Foreman, and the checks issued against the same by the Foreman (Pages 330, 331).

The traveling expenses of the forty or more persons procured by the Foreman to make said homestead entries on the public land within the enclusure were paid in money drawn from that account. Each entryman who was thus procured was also paid an average of $25.00 for making the entry, which money came from the same account. The land office filing fees for each entry were also paid by the Foreman from the same account. After fourteen months following the date of the entries of thirteen of the persons thus procured by the Foreman he arranged for them to "prove up" on their entries by commuting. Four of the thirteen were scheduled to make proof in that manner, but they did not appear at the land office at the date set therefor. The remaining nine never appeared at the Land Office at all. (Pages 275 to 379, 369 to 373, 240 to 243). The applications to commute were rejected, and that method of acquiring the public land within the enclosure was abandoned (Page 252).

The plaintiff in error told his Foreman on what tracts of land he desired relinquishments of the said homestead entries procured (Page 223). The Foreman thereupon proceeded to secure relinquish-

ment of the various homestead entries, paying to each entryman a sum of money varying from ten to sixty dollars, which money was drawn from the same account as above (Page 251). The money thus drawn from the funds of the plaintiff in error in connection with these illegal homestead entries in years 1903 and 1904 amounted to many thousands of dollars. The plaintiff in error also instructed the Foreman to get scrip, and thereby select and secure patent to such tracts of said public land as he secured relinquishments of (Page 225).

The indictment, containing three counts, was filed on Nov. 5, 1906 and charged that on May 16, 1906, the plaintiff in error maintained the enclosure in question, and that he also, by means of the said fence, prevented and obstructed free passage and transit over and through the said public land within the enclosure. The charge of maintaining the enclosure is set forth in the First count of the indictment, and is based upon Section I of the Act of Feb. 25, 1885 (23 Stat., L. 231). The Second count of the indictment was dismissed. The Third count contains the charge of preventing and obstructing, by means of the fence, free passage and transit over and through the said public land, and it is based upon Section 3 of the said Act.

II.

Assignment of Errors.

The errors assigned by the plaintiff in error re-

late almost altogether to the admission of evidence at the trial relating to the illegal homestead entries made by his employes and by others procured by his Foreman, upon the public lands within the enclosure. The argument in the brief of the plaintiff in error is devoted very largely to a discussion of those alleged errors. Errors are also charged in the refusal of the Court below to give certain instructions requested by the plaintiff in error, and in the giving of certain instructions that were given. However, an examination of the instructions given and those refused will show that the instructions requested and refused were substantially embodied in the instructions given (Pages 601 to 607). There could therefore, be no valid objection to the refusal to give the instructions requested. Van Gesner vs. United States, 153 Fed, 46. Coffin vs. United States 162 U. S. 664. Dimmick vs. United States 135 Fed. 259. In the latter case this Court said, quoting from case of Mountain Copper Company, Ltd. vs. Van Buren (C. C. A.) 133 Fed. 1, 7;

> "The rule is well settled that the Court is never required to give instructions in the language used by counsel. The duty of the Court is always fully discharged if its charge embraces all of the principles of law arising in the case, in the Court's own language."

Plaintiff in error further assigned as errors the

denial of his motion in arrest of judgment and his motion for new trial (Page 607), the former of which was made on the ground that the indictment did not properly charge the offense sought to be charged. This matter will be discussed later.

III.

Brief of Plaintiff in Error.

In the brief of plaintiff in error (Pages 4 & 5 thereof) it is contended that there was no enclosure, because there were "miles and miles" of open country where no fence obstructed. Whether or not there was an enclosure was a question of fact which was submitted to and decided by the jury. At page 515 of 127 Fed., in the case of Pooler vs. United States, the Court says: "A general verdict of guilty is presumed to find to be true everything alleged in an indictment, and in each of its counts."

The places where there was no fence and where it was impracticable to build one, were occupied by an effectual natural barrier, consisting of gulches, declevities, rocks, etc. (Pages 80, 81, 132 to 138, 147 to 149). It seems that questions of this kind have no place before this Court on a writ of error, as it has been frequently held that questions of fact will not be gone into by the appellate Federal Courts on a writ of error. Sec. 1011, Revised Statutes, Chin Man Can vs. United States, 170 Fed. 187; Dimmick vs. United States,

135 Fed., 257. Hume vs. United States, 118 Fed., 689. Hall vs. Houghton & Upp Mercantile Co., 60 Fed. 350.

There can be no question as to the propriety of the instructions to the jury at the trial as to what constitutes an enclosure (Page 540). The jury, who hears all of the evidence, is best qualified, under instructions, to determine whether hills, gulches, declevities, rocks, brush, etc., which were testified about in the trial, constitute a barrier such as would prevent and obstruct free passage of either man or beast to and upon public lands.

The charge also with reference to gaps and openings in the enclosure seems to be correct in every respect, and in full accord with the decisions upon this point (Page 542). In the case of Thomas vs. United States (136 Fed., Page 159) it is said by this Court:

> "The evidence for the appellee showed beyond dispute some 84 sections of odd and even numbered sections of land were substantially enclosed."

And further:

> "It is shown also that there is a gap three-quarters of a mile in the fence at a point where a cañon intervenes. It is admitted that the canon is impassible at that point; but it is said that cattle, by going three miles down the banks of the canon. can enter the cañon, and then by going up

the cañon, can get within the enclosure. It is not shown how far they would have to proceed within the enclosure before they could emerge from the cañon. It is absurb to say that this an opening in the enclosure. It was evidently left unfenced because it could not be fenced and because it was deemed unnecessary to make other provision against cattle entering through the cañon. Nor can the appellant maintain that this enclosure is not complete by showing that by the first of September in each year cattle may, if they possess sufficient intelligence or are driven there, go around the ends of the fences which extend into the lake.

The Court also cites the case of the United States vs. Brighton Ranche Company (26 Fed, 218), wherein Mr. Justice Brewer, (then Circuit Judge) at about the time of the passage of the act under which this prosecution is conducted, held, in substance, that the Government has a right to keep "Government land free from all obstruction".

It is also stated in the brief of the plaintiff in error (Page 6 thereof) that the plaintiff in error "was tried as a matter of indictment for building and maintaining a enclosure of the public land, and was convicted of attempting, by use of employes, to enter the public lands fraudulently un-

der the homestead law". The trial judge, in instructing the jury, expressly charged as follows (Page 543):

> "You will bear in mind, however, that the evidence as to these entries was admitted by the Court solely for one purpose, and can be considered by you only for that purpose, namely:—to throw light upon or illustrate the intention with which defendant maintained or controlled said fence and it is for you to determine what bearing and weight, if any, such evidence has upon said issue."

That instruction, in view of the decisions touching this point, would seem to wholly refute any charge that the plaintiff in error was convicted of attempting to procure unlawful homestead entries. Dimmick vs. United States, 135 Fed, 259, Williamson vs. United States, 207 U. S., 425, Van Gesner vs. United States, 153 Fed, 56.

It is complained, unseasonably here it is believed, that plaintiff in error was not notified of this phase of the prosecution, and was therefore unprepared to meet it. There was, however, no claim at the trial that the plaintiff in error was surprised or unprepared to proceed with his trial by reason of the introduction of evidence relating to the homestead entries on lands within the enclosure.

In the case of Sommers vs. Carbon Hill Coal

Company, 91 Fed., 341, Judge Hanford says:

> "Mere surprise is not a legal ground for setting aside the verdict of a jury unless the party alleging surprise shows that its effect was to deprive him of a fair trial."

Moreover it seems that the plaintiff in error was aware that testimony of this kind tending to show his good or bad faith in maintaining the enclosure was competent and that he came prepared for and with such evidence. In fact, it appears, the plaintiff in error gave almost exclusive attention and effort toward the production of evidence to show his good faith in maintaining the enclosure. On almost every page of the evidence introduced on behalf of the plaintiff in error appears testimony calculated to show his good faith and lawful intent in maintaining the enclosure, and it is obvious that he recognized at all times the importance of the question of his good or bad faith in the case.

It is also argued that because the public lands within the enclosure were withdrawn from entry in the year 1900, and were again opened for entry on January 7, 1903, the plaintiff in error could not have had in mind the intent to acquire the title to vacant land within the enclosure by unlawful homestead entries at the time of the erection of the fence, to-wit,—from 1901 to 1903. However, the prosecution in this case was not for erecting an enclosure, but for maintaining one. The en-

closure was maintained continuously from the very early part of 1903 until May 16, 1906, and, under the definition of the word "made," as used in the Act of Feb. 23, 1885, given by this Court in the case of Bircher vs. the United States, 169 Fed., 589, every day during those years that plaintiff in error "maintained" the fence he also "made" it, and if, on any of those days while he was "making," or "maintaining," said fence, he conceived the idea of further strengthening his control and occupancy of said public lands inside the fence by procuring ficticious and fraudulent homestead entries to be made in his behalf on said land, it would make no difference in this case whether the lands were or were not withdrawn from entry during the period covered by the actual construction of the fence.

It is further claimed that the plaintiff in error endeavored to follow certain instructions of a Special Agent of the General Land Office of the United States as to changes and openings in the fence that, it was claimed, the Government Agent required (Pages 502 to 511). While this evidence was introduced for the manifest purpose of showing the good faith and intent of the plaintiff in error, notwithstanding his claim now that good faith and intent have no place in a prosecution under this Act, the record shows that Mr. Lillis did not go to the officers and endeavor to ascertain whether or not his enclosure was lawful, and

that he did not communicate with the representatives of the Government until after his attention was called to his unlawful enclosure by the Government Agent, and even then, the testimony shows, that the Government Agent accused, in effect, the plaintiff in error with having broken faith with him in the matter of his promise to make such openings in the fence as would satisfy the General Land Office (Page 532). The Government Agent was deceased at the time of the trial (Page 299).

The views of Judge Hunt, given as recently as March, 1908, in his charge to the Jury in the case of United States vs. Edward Cardwell, in the District Court of the United States for the district of Montana, which case was before this Court on appeal (~~156~~ 159 Fed., ~~393~~ 592), are so pertinent as applied to the facts in this case that we are constrained to quote the entire charge, which is as follows:

> "Gentlemen: The material part of the statute under which this indictment was drawn, and under which Mr. Cardwell has been tried, reads as follows: "That all enclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, * * * to any of which land included within the inclosure the person * * * making or controlling the inclosure had no claim or color

of title made or acquired in good faith, or as asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made are hereby declared to be unlawful and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any "part of the public lands of the United States in any State or any

without claim, color of title, or asserted

prohibited.' "

" 'Section 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offense.' "

"Referring to the indictment in this case, you will remember that the charge against Mr. Cardwell is not that he erected the fence or that he built the enclosure. The charge is that he, on the 20th of February,

1907, wrongfully and unlawfully maintained and controlled, and caused to be maintained and controlled by him an inclosure of lands, consisting of a fence of posts and wires, which said fence then and there inclosed all the said tract of land comprising an area of approximately six thousand and forty acres, said lands so inclosed being public lands of the United States; and at the time of maintaining and controlling the said fence and inclosure, he had no claim or color of title made or acquired in good faith or asserted right to said lands by or with a view to entry thereof at the proper land office under the general laws of the United States."

"You will remember that there was pointed out to you by Mr. Baker yesterday, as surrounded by black lines, an area that he said he found inclosed by a fence. Sometimes in the consideration of these cases we are drawn away from the particular inquiry that we have before us. That inquiry in this case is this: Did Mr. Cardwell maintain an inclosure as defined by the lines in black pointed out by Mr. Baker before you yesterday? He is not charged with making separate inclosures within the large area. He is charged with maintaining an inclosure by

keeping the fence as defined in Mr. Baker's testimoy.

"An inclosure of the public lands is commonly and properly understood to be a tract of land within fences or barriers which separate that tract or area from the general body of the public domain. The erection of a fence as I have pointed out, is one element of the statute, but it is not to be considered here in arriving at a verdict, the charge here being that the defendant maintained a fence. To erect a fence around a tract of land means to construct it. It is to create the thing that incloses. It is the making of the inclosure. The maintaining of an inclosure is the keeping up of the inclosure. That would mean the keeping up of the fences about the land inclosed after they are put up. Remember **that this charge is maintaining,**— not erecting. So it is not important to ascertain who may have built that fence, provided you are satisfied, as the law demands, beyond a reasonable doubt, that Mr. Cardwell maintained it, and provided the inclosure was an unlawful one as contemplated by the law."

"I will give to you a statement of the law that I think is a clear and an accurate one. It was made by Judge Wolverton,

and I adopt it. He used this language: 'It is sufficient within the intendment of the statute that the inclosure comprising any of such public lands was designed and intended by the person or individual constructing or maintaing the same, to hinder or impede the ordinary ranging of stock, or its natural and free ingress from without, or egress from within, or is reasonably calculated in the manner of its construction or maintenance to accomplish a like result, or which serves to exclude or to hinder or impede other persons or the public from free and unstrained access to and upon the lands so inclosed for the purposes for which an individual has the right of access to public lands. Nor is it essential that the person constructing or maintaining the inclosure shall do so by fencing entirely his own, but he may accomplish the result by joining his fencing to that of others, so as to make the barrier complete, or he may conjoin his fence to natural barriers, such as ledges of rock, precipitous bluffs, steep declivities, or mountain ranges, or other natural obstructions, not readily passable, or which in their practical effect, would impede or interrupt the ordinary ranging of stock, or which, together with the fencing, would prevent or

obstruct the more natural and free passage of persons and individuals to and upon the public lands so included.'

"You will remember that there was pointed out upon the map within the black lines, where Mr. Baker said he found the fences, certain areas of public land. There were also certain areas pointed out which had fences upon them erected by Mr. Cardwell. But it is not disputed that within the whole tract, as described in the indictment, there were large bodies of public lands. The contention of the Defendant was not that those were not public lands, but that he had erected his fences with a view to fencing his own land, and in a manner which would not constitute a transgression of the law. But keep in mind what I have said before. The question that you must pass upon is as to that outer fence surrounding the whole tract described in the indictment. The relevancy of the testimony concerning the fences on the inside is only in so far as it may have to do with the contention that in fencing his own land, he did what was lawful, and did not do what was unlawful in fencing, if there was any fencing, of the public lands."

"The fencing or inclosing of land does not become unlawful merely because either

of these acts prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on a tract of the public land subject to settlement or entry under the public land laws of the United States. The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing the public lands of the Government that the fence or inclosure becomes unlawful. That is the law as interpreted by the court of appeals of this circuit, and it is the law which must control this court and the jury. It is the law as enunciated after the decision in the Camfield case, which went to supreme Court of the United States 'Camfield vs. U. S., 167 U. S. 518.) There the facts were quite different from the facts in the case at bar. As I understand it, gentlemen, the effect of that decision is that if a man owns six hundred and forty acres of land, he can fence it; but if he fences his own land and also fences Government land, and his purpose is not

only to fence his own land, but is to get the benefit of the public land and to inclose that so as to prevent such ingress and egress as has been explained to you there should be, then he violates the statute."

"It is not necessary that the fence inclosing a tract of Government land should be at all places connected to constitute an inclosure of public lands within the meaning of the Act of Congress forbidding the unlawful occupancy of the public domain. It is sufficient if the fences, as placed, were intended by the person constructing or maintaing the same, to hinder or impede the ordinary ranging of stock, or the natural and free passage of such stock, or were intended and are reasonably calculated in the manner of their construction and maintenance to accomplish that result, even though openings may have been left in the fence surrounding the land. And if the fences are so placed and constructed as to impede or prevent ordinary free access to or passage over the public lands inclosed by stock ranging and pasturing upon the public domain in the usual and customary way, and such result was intended, it would constitute an inclosure of public lands within the meaning of the statute, even though some openings might have been

left in the fence."

"If my memory is accurate, the testimony was to the effect that in a coulee close by Keiser Creek, there was an opening in the fence, and probably no gate. Now, in the light of what I have said to you as being a statement of the law, was that an opening? Was that an opening that would enable one to get free access to the public domain with his stock? It is not only a man that you must consider; it is the use by man under conditions to which land is usually fit for use, in this country particularly—the ranging of stock."

"The defendant is presumed to be innocent, and the burden is upon the Government to satisfy you beyond a reasonable doubt of his guilt in the manner and form charged. There was some contention made by the defendant to the effect that there was no proof at all that he maintained any of these fences, but there is sufficient testimony to submit that matter to you, to determine whether it is a reasonable inference from the evidence that he did maintain them, as charged."

"All twelve of you must concur in any verdict rendered. You are the exclusive judges of the credibility of the testimony."

In overruling the motion in arrest of judgment

in that case, Julge Hunt also said, among other things:

> "The whole statute is one framed with a view to stop the occupation of public lands and to meet every situation that, it would seem, could possibly arise to annoy or harass or impede the bona fide home-seeker or claimant under the land law."

IV.
Argument.

Everything that the plaintiff in error did or caused to be done with respect to the public lands within the enclosure that went in support of his efforts to, by such enclosure, secure for the use of himself and such other persons as he chose, the exclusive dominion and control of the public lands within the enclosure during his maintenance thereof, was relevent and properly admitted in evidence. Krause vs. United States, 147 Fed., 449.

In the Krause case, where it was shown that within the enclosure there were numerous bona fide homestead settlements, evidence was admitted of various acts and declarations on the part of the plaintiffs in error bearing on their intent in maintaining the enclosure. During the course of the trial in that case, evidence was offered "on the part of the Government as to the location of certain gates and roads, the herding and ranging of defendants' cattle, colloquies, quarrels and fights

between the defendants, or one of them, and persons seeking to make homesteads on or coming upon and over certain of the lands. On objections interposed by defendants, the Court made the following statement:

> 'It is admissable, for the purpose of showing what was the purpose and intent of their building these fences. Was it simply to enclose their own lands, or was it for the purpose of making the enclosure of Government lands with their own, or somebody else, for the purpose of giving them a benefit over what the general public would have? . . . It certainly goes to show what was their intent and purpose in enclosing Government land, if they enclosed any.. . . . We are trying the question as to whether or not the Mr. Krauses have enclosed Government land with a view and a purpose of having a better control over it themselves than the public generally, and whatever they said or did with regard to land in this enclosure is competent as bearing upon their purpose and intent and good faith in building the enclosure enclosing the lands, if anything. . . . It is only material as it may bear upon the intent and purpose of the defendants in making the enclosure, as to whether or not their purpose and intent was to give

to themselves a right to the use of Government land to an extent greater than the general public could have. In other words, in a measure withdrawing the use of certain public lands from the general common use by all the public.' . . . We preceive no valid objection to these views of the Court being expressed in the presence of the jury." (The last statement was made by the Circuit Court of Appeals for the Eighth Circuit.).

It is, as stated before, mainly complained of that the Government was allowed to introduce evidence of the procuring of the unlawful homestead entries to be made on lands within the enclosure during the period of its maintenance. There are almost numberless cases holding that colatteral facts are admissible in evidence to explain the intent, motive, good faith and knowledge of the offender in the commission of the main act. Sprinkle vs. United States 141 Fed. 815. Van Gesner vs. United States, 153 Fed. 46. Williamson vs. United States, 207 U. S., 207; Fitzpatrick vs. United States, 178 U. S., 313; Jones vs. United States, 162 Fed. 417; and it seems that under every case decided under this act, where the question has arisen as to intent and good faith, such intent and good faith of the accused has been held to be an essential element of the prosecution of a case for maintaining or erecting an enclosure of public

lands, especially where the accused has also lands of his own within the enclosure. Take the Potts case (114 Fed., 55), in which this Court said:

> "Upon this evidence it was clearly the duty of the Court to submit to the jury the question whether the defendant's fence or enclosure was erected by him in good faith to enclose his own land, or whether, in joining his fence with that of others, it was his intent and purpose to prevent or obstruct any person from peacably entering upon, or establishing a settlement or residence upon, the tract of public land described in the indictment."

In that case the fence erected by Potts did not surround any tract of public land. It was constructed between a tract of public land and the County road, and prevented persons from passing from the County road to the public land, but it seems evident that Potts had no thought of the public land, and did nothing with respect to it, when he built his fence to enclose his own land. The good faith and intent to enclose his own land seems apparent and was an important element in the case. How different it would have been, if, after constructing the fence, Potts had immediately procured some dozens of farm hands and idlers from neighboring villages to make fraudulent homestead entries upon the Government lands situated beyond his fence, and would have proceeded

to have cabins erected upon that Government land, and would have maintained possession and control of that land through those fraudulent entries until a time when it would have been convenient for him to secure relinquishments of said entries, and then, to secure patent thereto from the Government by means of "scripping." Would anybody undertake to say that evidence of those homestead entries would not have been admissible as showing the good faith or intent on the part of Potts with respect to he public lands, in erecting and maintaining his fence? Those entries would have gone in support of that fence in preventing and obstructing free passage and transit over and through the public lands, and would have given Potts an undue and unlawful advantage over others in the use and occupancy of that land. They would have demonstrated that the fence was built not only to enclose his own land but to assist him in preventing others from using public land, and enabling himself to use it exclusively.

In the case of Camfield vs. the United States (167 U. S., 518), the Court said: (This language was also partially quoted by this Court in Cardwell vs. United States, 136 Fed. 593.)

> "It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Gov-

ernment, or by ordinary processes of courts of justice. . . . But the evil of permitting persons who owned or controlled the alternate sections to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the Act of Feb. 25, 1885, forbidding all enclosures of public lands, and authorizing the abatement of the fences. . . . So far as the fences were created near the outside line of the odd numbered sections, there can be no objections to them, but so far as they were erected immediately outside of the even numbered sections they are manifstly intended to enclose the Government's lands, though, in fact, erected a few inches inside the defendant's line. Considering the obvious purposes of this structure and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private idividual."

While this was a suit in equity, the doctrine therein is, in practically all particulars, applicable to the case at bar, and shows very clearly that the intent and purpose with which a person builds and

maintains a fence which encloses Government land is essentially an element to be inquired into. Would anyone deny, if Camfield had procured "dummies" to make entries on the Government land within the enclosure maintained by him, that evidence of such entries would have been admissible? Would not such evidence have been competent in explaining the intent and good or bad faith with which he maintained that enclosure? Would it not have shown that he had designs upon that land in maintaining the fences, and that he viewed the fence and the public land therein with a single eye?

To refer again to the case of the United States vs. Brighton Ranche Company, decided by Mr. Justice Brewer (then Circuit Judge) in the Circuit Court for the District of Nebraska, May term, 1885, the same year in which the Act, upon which this prosecution is based, was passed, the matter of intent in the maintenance of an enclosure of public lands is therein clearly shown to be an element of the act. In the case of Carroll vs. United States (154 Fed., Page 425) this Court said:

> "The Court ruled that the deed was admissible for the purpose of showing good faith, but for no other purpose. We find no error in that ruling." . . . "The instruction was that, if the plaintiff in error honestly believed that he had a right to enclose such land by reason of having pre-

viously procured the deed, the jury might consider that fact as tending to show the intent with which he enclosed that particular tract of land, 'because', said the Court, 'without the intent to enclose public lands, knowing them to be such, there can be no offense.''

Referring again to the Krause case (147 Fed., 442), the Circuit Court of Appeals for the Eighth Circuit substantially approved the doctrine of the trial court as set forth above, to the effect that the main question to be determined in the cases under this law is whether or not the enclosures are constructed for the purpose of giving those maintaining them a better control over the enclosed public lands than the public generally would have, and that whatever was said or done with regard to the public land enclosed by the person maintaining the enclosure is competent to show his purpose and intent and good faith in so maintaining it, and that the evidence of acts done by such persons with respect to the public lands enclosed is material to show their intent and purpose to gain for themselves a right to use the public lands to a greater extent than the public generally would have.

The emphatic reiteration of counsel for plaintiff in error that the act in question prohibits absolutely "all" enclosures of public lands, regardless of intent, and their strong reliance upon the doc-

trine set forth in the Camfield case, would seem to lead to a difficulty in construing the Act. The Supreme Court says that Camfield could have fenced separately each section owned or controlled by him in that case, and that he would have thereby been lawfully enclosing public land. This would be an enclosure of public lands by Camfield which would not be unlawful, and of which the Government would have no right to complain, "But," the Court proceeds, "where under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute." Therefore, if there is some guise or hidden purpose or intent, on the part of the person who maintains an enclosure, with respect to the public lands enclosed, it is necessary to search for the true and real purpose or intent, though hidden, and uncover the guise. If Camfield had enclosed each separate section of his own land and thereby made enclosures of Government land also, and if he had thereafter procured "dummy" entrymen to make unlawful homestead entries of the Government land within these enclosures, would not evidence have been admissible and competent concerning that fact to throw light upon the intent of Camfield in putting fences around his own land? So in the case of United States vs. Douglas-Willan Sartoris Co., 3 Wyo., 288, the Court held in effect that there could be a lawful

enclosure of public lands. The distinction appears to be, in cases where the inclosure includes both private and public lands, that the inclosure does not become unlawful until the accused does some act indicative of an intent on his part to unlawfully occupy and use the public lands enclosed.

Since, however, there appears to be a difference of opinion as to the meaning and construction of this Act, which says that "all enclosures" are unlawful, although that part of the statute obviously cannot be literally construed or followed under certain circumstances, but is open to interpretation and construction, we must cast about for every aid in arriving at its true meaning.

It appears that this Act has been before this Court for consideration more frequently than before any other Court of Appeals in the United States, and in practically every case the Court has referred to its title, presumably for the purpose of setting forth more clearly its object and meaning. Thomas vs. United States, 135 Fed., 159; Cardwell vs. United States 136 Fed., 593; Carroll vs. United States 154 Fed., 425; Bircher vs. United States, 169 Fed., 589.

See also United States vs. Cook, 36 Fed., 896; United States vs. Osborne, 44 Fed., 29; United States vs. Elliott, 74 Fed., 92; and United States vs. Brandestein, 32 Fed., 738, in which case Judge Hoffman stated, on November 25, 1887—soon after the passage of this Act—as follows:

> "That Act, as the debates clearly show, was intended to prevent the enclosure and appropriation of vast tracts of public land, said to be millions of acres in extent, by associations of wealthy cattle owners known as 'cattle kings', without a shadow or pretense of title."

And in the Camfield case the Supreme Court said, "Indeed, we know of no reason why the policy, so long tolerated of permitting the public lands to be pastured, may not be still pursued, provided herdsmen be employed, or other means by which the fencing in, and the exclusive appropriation of such land shall be avoided"

The title of this Act is, "An Act to Prevent Unlawful Occupancy of the Public Lands." We think that the title determines beyond question the exact meaning and purpose of the statute, and that it further controverts and silences any contention that evidence of attempts to effect unlawful occupancy, control and dominion of public lands by means of unlawful homestead entries is not relevent and material and almost indispensible in a prosecution thereunder. Chief Justice Marshall said, in the case of United States vs. Fisher (Second Cranch 386):

> "When the mind labors to discover the design of the Legislature it seizes everything from which aid can be derived; and

in such case the title claims a degree of notice and will have its due share of consideration."

We quote also from the case of the Oregon & California Railroad Company vs. United States, decided by this Court and appearing in 57 Fed., 655, as follows:

> "That the title describes but one road seems to be conceded, but it is objected that the title is no part of an act. This is true in a certain sense, but it is firmly established that the title may be resorted to as an aid to interpretation. And sensibly so. Its purpose is descriptive, and if it receives less consideration than the body of the act, it receives enough to be some index of intention. . . . The title therefore cannot disregarded. Giving it the attention which the rule announced by the learned Chief Justice requires to be given to it, and interpreting it as describing one road, is it consistent with the body of the act and the body of the act with it? We think so."

This Court also said, in United States vs. Nakashima (160 Fed., 845):

> "The title of the act, while it may not be used to extend or restrain any positive provisions found in the body of the act, may be resorted to in a case of doubt for the purpose of ascertaining its meaning."

United States vs. Oregon & Calif. Railroad Co. (164 U. S., 526).

United States vs. Union Pacific Railroad Co. (91 U. S., 224).

White vs. United States (191 U. S., 525).

United States vs. Palmer (3 Wheaton, 610).

Old Trinity Church vs. United States (143 U. S., 457).

United States vs. Union Pacific Railway Co. (37 Fed., 551).

Wilson, et al vs. Spaulding (19 Fed., 304).

It would seem as reasonable, in a prosecution under an act to prevent burglary, to contend that evidence that the accused entered the house in question is not admissible, as to argue in this case, which is a prosecution under an "Act to prevent the Unlawful Occupancy of Public Lands," that evidence that the accused herein did unlawfully occupy the public lands in question by means of unlawful homestead entries, is inadmissible.

By virtue of the authority given him by this Act, President Cleveland issued a Proclamation on August 7, 1885, beginning with the following preamble:

> "Whereas, public policy demands that the public domain shall be reserved for the occupancy of actual settlers in good faith, and that ~~of~~ our people who seek homes upon

such domain, shall in no wise be prevented by any wrongful interference from the safe and free entry thereon to which they may be entitled;" * * **.

In that Proclamation it was ordered that all unlawful enclosures of public lands should be immediately removed.

Attention is invited to the following excerpts from Cyclopedia of Law and Procedure, Vol. 32, Page 795, where this Act is discussed: "But where the land owner, in good faith, for the purpose of enclosing his own land, builds a fence on the line extending around the tract, such act is not unlawful, even though such fence so connects with fence lines of other owners as thereby to enclose unclaimed public lands."

And again, "On the trial of an indictment for enclosing and establishing an exclusive right to public land, without claim or color of title, acts, conduct and statements of defendants tending to show the assertion of the right to exclude the general public or others from the lands described are competent evidence." It was stated in the case of the United tSates vs. Douglas-Willan Sartoris Company, 3 Wyo., 288, that the erection of a fence around Government land is equivalent to an assertion of exclusive right to the use and occupancy of such enclosed Government land.

At page 37 of the brief of plaintiff in error it is said:

> "It was not decided in the Potts case, nor was it meant to be decided, if we apprehend the language, that any criminal intent is a part of the statuory offense or of the Government's case."

It seems, however, that all of the cases decided under this Act touching this point, hold that it is competent to show whether the plaintiff in error in good faith maintained the enclosure for the purpose of enclosing only his own land or whether under the guise of enclosing his own land he really had in mind and intended to also enclose, monopolize and unlawfully occupy Government land within the enclosure, or whether he had improper designs upon the Government land enclosed, and that evidence of any act done or caused by him, that tended to illuminate or disclose his real purpose and intent with reference to the Government land enclosed, is competent in a prosecution for maintaining an enclosure of such land.

Therefore, since we have this very Act so frequently construed on the question of good faith and intent, we fail to see that the case of Armour Company vs. The United States (209 U. S., page 56) has any bearing on this case. (Brief, page 37). Any other construction of the "Act to Regulate Commerce" than that in the Armour case would make it possible to defeat the whole purpose of the Act.

We think that the case of the United States vs.

White (42 Fed. 138) is more nearly in point as showing that good or bad faith may be an element in a statutory offense where the statute itself makes no mention of intent or good faith. In that case, White, being engaged in the retail drug business, "had been selling to a dentist at frequent intervals alcohol for the burning of the lamp used by the dentist in that business. The defense introduced testimony tending to show that the article sold to the dentist was cologue, or rather, alcohol into which bergamot or some of the ingredients of cologne had been placed. There was also testimony on the part of the Government tending to show sales of liquor mixed with small quantities of glycerine, oil of cloves and quinine." That case was prosecuted under Section 3242, Revised Statutes, the pertinent part of which is "Every person who carries on the business of a * * * retail liquor dealer * * * without having paid the special tax as required by law, shall for every such offense be fined not less than $1,000.00 nor more than $5,000.00 and be imprisoned not less than six months nor more than two years."

A retail liquor dealer is defined in Section 4 of the Act of March 1, 1879, as being one who sells or offers for sale liquors in less quantities than five gallons at one time. Section 3246 Revised Statutes provides that druggists shall not be required to pay the special tax as to liquors used by them in the preparation of medicines.

In the instructions to the jury, Judge Severens said: "The law permits druggists to use whiskey in compounding medicine. In the exercise of that right and privilege he is to be bound, and his conduct is to be tested by his good faith. If he compounds whiskey in good faith with some other materials for medicinal purposes he is not responsible as a retail liquor dealer; if, on the other hand, he used some other admixture or element to put with the whiskey to make it go for something else without having regard to the medicinal character of its medicinal purpose, then he is liable as a retail liquor dealer because the law would not permit the makeshift or sham to stand in the way. You must look to the substance of the thing itself, and its real essence and character." The "makeshift" or "sham" corresponds to the "guise" in the Camfield case.

As was stated by the United States Attorney at the trial, evidence of the illegal homestead entries made on the behalf of the plaintiff in error also goes to show his knowledge that there were public lands within the enclosure, and the Government cannot be precluded from introducing competent testimony by the fact that the plaintiff in error admits the same. But testimony of those entries goes further in this direction and shows that whatever color of title or claim to the public land within the enclosure the plaintiff in error might have had, was made and acquired by him,

not in good faith, but unlawfully and in bad faith. Such evidence was a proper part of the Government's main case in support of the allegations in the indictment. In this connection we quote from the case of Cameron vs. United States, 148 U. S. 306, as follows: "The law (Act to Prevent Unlawful Occupancy of the Public Lands) was, however, never intended to operate on persons who had taken possession under a bona fide claim or color of title; nor was it intended that in a proceeding to abate a fence erected in good faith the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands enclosed were not public lands of the United States enclosed, or that defendant had claim or color of title

"The fact that the evidence objected to tended to show defendant guilty of another crime is no reason for excluding it."

Moore vs. U. S., 150 U. S. 57; 37 L. Ed. 996.

That a literal violation of the terms of the statute is not alone conclusive of guilt. See U. S. vs. Graf Distilling Co. 208 U. S. 198; 52 L. Ed. 452.

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matters of construction of statutes and indictments. However, decisions rendered by State Courts have no control and are not authority in criminal cases in the Federal Courts.

In the case of Logan vs. United States, 144 U. S., 302, the following language is used:

> "For the reason above stated the provision of Section 858 of the Revised Statutes that 'the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the Courts of the United States in trials at common law and in equity and admiralty' has no application to criminal trials; and therefore, the competency of witnesses in criminal trials in the Courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state."

In case of the United States vs. Hall, 53 Fed., 353, it is also said:

> "The first position of defendant's coun-

sel, viz:—that the criterion in the admission of evidence is the law as it existed in 1789, is well taken. Section 858, Revised Statutes, after certain provisions not here pertinent provides: 'In all other respects the law of the states in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of United States in trials at common law and equity and admiralty.' At first view it might seem this included criminal cases, but the contrary has been decided."

In United States vs. Reed, 12 How. 363:

"But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another."

Manchester vs. Mass., 139 U. S. 262.

Allis vs. United States, 155 U. S., 124.

United States vs. Coppersmith, 4 Fed., 205.

United States vs. Stone, 8 Fed., 239.

United States vs. Malloy, 31 Fed., 19.

United States vs. Clark, 46 Fed., 635.
United States vs. Insley, 54 Fed., 223.
United States vs. Davis, 103 Fed., 457.
Lang vs. United States, 133 Fed., 204.
Pooler vs. United States, 127 Fed., 510.

VI.

At page 45 of the brief of plaintiff in error it is contended that the indictment fails to properly negative the exceptions in the statute, and that it is therefore insufficient. While Judge Deady, in 36 Fed., page 490, in the case of United States vs. Felderward, held in effect that under a count of an indictment based upon the First Section of the "Act to Prevent the Unlawful Occupancy of the Public Lands" it is necessary to allege in the indictment that the defendant was not within either of the exceptions; but he concludes that:

> "The form of the pleading in this respect will make but little difference in the trial of the case, as slight proof of these negative allegations will shift the burden of proof onto the defendant."

That was a decision on a demurrer on the ground that the indictment did not allege that the defendant had no lawful claim or color of title acquired in good faith or an asserted right by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States.

The case of United States vs. Churchill, 101

Fed., 443, which is also a decision upon a demurrer, is cited as being conclusive of the fact that the indictment in this case is bad. The indictment in the Churchill case was based upon Section One of this Act, and it was held that the indictment was defective because it did not properly negative the exceptions stated in the statute. That decision was, however, disapproved by this Court in the case of Bircher vs. the United States, 169 Fed., 592. The following is quoted from the syllablus of the latter case:

> "An indictment charging such an enclosure was not defective for failure to allege that, at the time the enclosure was made, defendant had no claim or color of title to the land made or acquired in good faith or a right thereto asserted with a view to entry."

The last three cases cited, United States vs. Falderward, United States vs. Churchill, and United States vs. Bircher, relate to the First Section of the "Act to Prevent Unlawful Occupancy of the Public Lands", and in an indictment under that Section it might be conceded that it is necessary to negative the exceptions therein contained, and that on a demurrer to an indictment, failure to negative such exceptions might render the indictment insufficient; but in an indictment or a count under Section Three of that Act, such as the Third count in the indictment in this case, it is

quite unnecessary to negative the exceptions or to make any allegations to the effect that the defendant had no color of title or claim acquired in good faith, or an asserted right to the public lands enclosed. The part of that Section of the Act defining the offense is complete without any reference to the exceptions, and it is clearly a matter of defense for the defendant to show that he had a color of title or claim to such lands made or acquired in good faith, or an asserted right thereto, with a view to lawful entry. Nelson vs. United States 30 Fed., 116.

The Third Section of the act is as follows:

> "Sec. 3. (Obstruction of settlements on, and transit over, public lands.) That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the publands: Provided, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said land under the land laws of the United

States, claiming title thereto, in good faith. (23 Stat. L. 322)."

In considering an indictment under this Section, the following clear and forcible language was used in the case of United States vs. Cook, 36 Fed., 897:

"Looking at the statute it is seen that the section to which the proviso is appended defines the acts which constitute the offense, and defines them completely without any reference to the proviso, or to any matter contained in it. There is nothing in the proviso that enters into the offense condemned, but its sole office is to exempt from the operation of the section those persons who have gone upon, improved, or occupied such public lands under the land laws of the United States, claiming title thereto in god faith. That this is a matter to be shown in defense seems to me to be clear. If the defendant comes within the exemption it is an easy matter for him to show it; whereas if the prosecution should be required to allege, and consequently to prove, that defendant did not go upon, improve, or occupy the land under the land laws, claiming title hereto, in good faith, it would be casting upon the Government the burden of proving a difficult negative, and I think the statute was wisely so framed

as to leave it to the defendant, if he falls within the exemption, to show the fact. As the averments in respect to the matter referred to were unnecessary they may be disregarded as surplusage."

In the case of Evans vs. United States, 153 U. S., 590, Mr. Justice Brown says:

"While the rules of criminal pleadings require that the accused shall be fully apprised of the charge made against him, it should, after all be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the Government may be entrapped into making allegations which it would be impossible to prove.

"Where there is no question of variance * * * the indictment need not by way of negative, introduce matter of defense when it is drawn on a statute any more than when it is at common law." I Bishop, Crim. Proc., Sec. 638.

So, in this case, that part of the Third count of the indictment quoted at Page 47 of the brief of plaintiff in error which sets forth the exceptions embraced in the proviso in the Act might be disregarded as surplusage.

We do not mean, however, to be understood as conceding in the slightest degree that the form in

which the exceptions are negatived in any of the counts of the indictment, is open to valid criticism, and especially do we insist that such form is sufficient and proper after verdict. In this case no demurrer was filed and no motion was made to quash the indictment.

The rules of the Federal Courts in this respect, as well as others affecting criminal cases, are not controlled by the rules in State Courts, but are more liberal and less cumbered by technicalities which do not affect the merits of a particular case.

It was held by Judge (now Mr. Justice) Lurton in the case of Hardesty vs. United States, 168 Fed., 25, that failure to demur to an indictment or to move to quash the same is, after verdict, equivalent to a waiver of any objection to the form thereof.

In the case of Peters vs. United States, 94 Fed., this Court said, at Page 131:

> "The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet."

Section 1025 Revised Statutes, provides:

> "No indictment found and presented by a Grand Jury in any district or circuit, or

other court of the United States shall be deemed insufficient, nor shall the trial judgment or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to prejudice the defendant."

In United States vs. Rhodes, 30 Fed. 434, Mr. Justice Brewer (then Circuit Judge) said:

> "While a defendant should be clearly informed in the indictment of the exact and full charge made against him, yet no defect or imperfection in matter of form only—and this includes the manner of stating a fact—which does not tend to his prejudice; will vitiate the indictment."

In Connors vs. United Stats, 158 U. S. 408, Mr. Justice Harlan said, referring to defects in an indictment:

> "Nor if made by demurrer or by motion and overruled would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the Court to require a more restricted or specific statement of the particular mode in which the offense charged was committed (Rev. St. Sec. 1025)."

In the case of Potter vs. United States, 135 U. S. 455, Mr. Justice Brewer said:

> "While there is plausibility in the contention of counsel, yet we think it would

be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge."

Mr. Justice Brewer also said in the of Dunbar vs. United States, 156 U. S. 191:

"While in an indictment under those sections it might not be sufficient to use only those words in the describing of property charged to have been smuggled because they are too general and do not sufficiently identify the property, yet any words of description which make clear to the common understanding, the articles in respect to which the offense is alleged is sufficient * * * This of course is not to be construed as permitting the omission of any matter of substance (United States vs. Carll, 105 U. S. 611), but is applicable where the only defect complained of is that some element of the offense is stated losely and without technical accuracy."

Wright vs. United States, 108 Fed., 810.
United States, vs. Howard, 132 Fed. 352.
Clement vs. United States, 149 Fed., 305.

Jones vs. United States, 162 Fed., 417.

The offense herein is a statutory one, and it is also a misdemeanor. That strictness in the mode of setting forth the allegations in an indictment that is contended for in the brief of the plaintiff in error and in the cases cited therein (Page 48 of brief) is not required in pleading a statutory offense which is a misdemeanor. Among the cases cited on this point by counsel for plaintiff in error is that of Pettibone vs. United States, 148 U. S. 197. The offense therein charged was conspiracy under Sec. 5440 R. S., which is of the nature of the common law crime of conspiracy, and the very nature of the offense requires particularity of details in the allegations of the indictment. In the case of United States vs. Post, 113 Fed. 854, the offense was that of using the mails in promoting a scheme to defraud (Sec. 5480 R. S.). The indictment failed to sufficiently describe the scheme. As the scheme to defraud is of the very gist of the crime, the details of description thereof and the manner in which it was designed to effect the fraud must of course be clearly set forth, and the same may be said of the case of United States vs. Hess, 124 U. S. 486, in which the same offense is charged. In the case of United States vs. Statts, 8 How. 41, the offense was that of presenting a forged document, and the indictment was objected to because it failed to allege a feloneous intent on the part of the defendant in presenting the

document. As intent is a very essential ingredient of that offense, it necessarily follows that it must be clearly alleged. In the case of In re. Wolf, 27 Fed. 606, the offense was that of conspiracy, and, as stated above, the details thereof must be charged with precision. In the case of In re. Corning, 51 Fed. 205, the defendants were charged with violating the Act of July 2, 1890, being an Act to protect trade and commerce against unlawful restraints and monopolies, which, in its very nature, involved a vast number of details as to the methods whereby a monopoly or restraint of trade might be effected by two or more persons. Counsel for plaintiff in error then quote from a number of state cases, but, as stated above, they have no controlling effect in Federal Courts, and we therefore have not commented upon them.

As opposed to the decisions cited by counsel for plaintiff in error there is a vast number of cases which hold that a statutory offense, and especially when it is a misdemeanor may be alleged in the language of the statute, and that is substantially what was done in the indictment in this case.

In the case of Ledbetter vs. United States, 170 U. S. 612, Mr. Justice Brown said: "But where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient * * * ."

In the case of Blitz vs. United States, 153 U. S.

315, Mr. Justice Harlan stated:

> "The general rule that an indictment for an offense purely statutory is sufficient if it pursues substantially the words of the statue, is subject to the qualification, fundamental in the law of criminal procedure, 'that the accused must be apprised by the indictment, with reasonable certainty, of he nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.' "

In the case of United States vs. Ballard, 118 Fed. 758, Judge Phillips said:

> "It is objected to the indictment, inter alia, that it does not sufficiently describe the offense. It is sufficient to say in respect of this objection that the offense is statutory, and where the statute itself describes the offense an indictment is good which follows the language of the statute, and, as in this case, describes what was the act done constitutive of the offense."

In the case of Peters vs. United States, 94 Fed., Page 131, this Court said:

> "Where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be

punished, it is sufficient to charge the defendent in the indictment with the acts coming fully within the statutory description in substantial words of the statute."

United States vs. Mills, 7 Peters, 142.

United States vs. Gooding, 12, Wheaton 474.

United States vs. Britton 107, U. S. 665.

Cannon vs. United States 116, U. S. 78.

Evans vs. United States, 153 U. S. 587.

Pounds vs. United States, 171, U. S. 38.

United States vs. Henry, 26 Fed. Cases No. 15350.

The objection on Page 47 of the brief of plaintiff in error that the word "or" is used before the words "an asserted right" instead of "and" is a technical objection going to the form only, and is not good, especially after verdict, in view of Section 1025 Revised Statutes and the many decisions cited and quoted from. The objection that the negativing of the exceptions is by way of recital is also a technical one, going to the form only, and is not well taken.

To show that the Circuit Court of Appeals for the Eighth Circuit has held that a count in substantially the same language as that in the first count of this indictment, is sufficient, we quote from the case of Krause vs. United States, 147 Fed., 445, as follows:

"The first count of the third indictment

is predicated on Section 1 of said statute, which, after laying the venue, charges that the defendants on the 1st day of August, 1903—

'Did then and there wrongfully, unlawfully, willfully and knowingly, maintain and control an inclosure of the public lands of the United States, containing four thousand five hundred and sixty acres (a particular description of which follows), said inclosure so maintained and controlled consisting of and being posts and wire fences, and they, the said John Krause and Herman H. Krause, so maintain-

closure as aforesaid, then and there having

made or acquired in good faith or asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office of the United States in said District, under the general laws of the United States, contrary, etc.

This clearly enough charges the offense of maintaining and controlling an inclosure of public lands within the prohibition of the statute."

In the case of Pooler vs. United States, 127 Fed., 518, the Circuit Court of Appeals for the First Circuit, said:

"The next proposition is that some of the allegations in the indictment are in the par-

> icipal form—as for example, in those portions of the various counts which use the words 'by then and there executing and presenting.' It would be enough to say that this does not appear in the second count, but for the reason stated with reference to the proposition last discussed this form of allegation is clearly sufficient in the Federal Courts in misdemeanors, and also is in harmony with the common practice in all courts. Wharton's Precedents of Indictments, 2nd Ed. Forms (216) for assault and battery (221) for assault and inciting a dog to bite (529) for false pretenses and many others that might be stated."

Section IV of the "Act to Prevent the Unlawful Occupancy of the Public Lands" provides the penalty for violations of the provisions of that act. The pertinent part thereof is "any person violating any of the provisions herein * * * shall be deemed guilty of a misdemeanor, and fined in a sum not to exceed One Thousand Dollars and be imprisoned not to exceed one year for each offense."

The sentence imposed upon the plaintiff in error in this case was a fine of One Thousand Dollars and imprisonment for a term of six months. The entire sentence therefore might have been imposed upon a verdict of guilty on either of the counts

prosecuted. Therefore, while we are absolutely confident that both of the counts are sufficient, the rule is that if one count of the indictment is good and the sentence is such that it could be imposed under such count, the judgment will not be reversed.

In the case of Dunbar vs. United States, 156 U. S., 392, in which there were fifteen counts in the indictment, the Court said: "One good count is sufficient to sustain the judgment."

In Peters vs. United States, 94 Fed. 134, this Court said:

> "As the verdict of guilty was rendered upon all the counts, and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient."
>
> Claassen vs. United States, 142 U. S. 140.
>
> Evans vs. United States, 153 U. S. 584.
>
> Dimmick vs. United States, 112 Fed. 350, 116 Fed. 825.
>
> Pooler vs. United States, 127 Fed. 511.
>
> Clement vs. United States, 149 Fed. 350.

It is respectfully submitted that the judgment herein should be affirmed.

OSCAR LAWLER, Assistant Attorney General.

A. I. McCORMICK, United States Attorney.

FRANK STEWART, Assistant United States Attorney.

No. 1716

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MAGNUS KJELSBERG,

Plaintiff in Error,

vs.

B. A. CHILBERG,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1716

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

WM. H. PACKWOOD, Nome, Alaska,
C. D. MURANE, Nome, Alaska,
O. D. COCHRAN, Nome, Alaska,
Attorneys for Plaintiff.
IRA D. ORTON, Nome, Alaska,
R. G. HUDSON, Nome, Alaska,
Attorneys for Defendant.

In the District Court of the United States for the District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Complaint.

Plaintiff complains of the defendant and for cause of action alleges:

I.

That heretofore, to wit, between the first day of September, 1904, and about the first day of September, 1905, the plaintiff and defendant were copartners in the Discovery Saloon business, in the town of Nome, District of Alaska, and were equally interested in the profits accruing from said business during said period of time, the agreement between the plaintiff and defendant being that each were to contribute one-half of the amount for a Federal license for conducting said business, and each were also to

contribute an equal share for the purchase of any stock of merchandise, liquors and cigars, used or to be used in connection with said business; it being further agreed that the defendant would furnish the building and fixtures in the Discovery Saloon building in which said saloon business was carried on and conducted, and the plaintiff was to devote his time and attention to said business, in consideration of the defendant contributing the use of said building and fixtures. That said saloon business was conducted and carried on under the aforesaid understanding and agreement between the dates aforesaid, and until about the first day of September, 1905, and that the license was issued to the plaintiff alone. That each of said parties, plaintiff and defendant herein, kept and performed each and all of the terms and conditions of said copartnership agreement until about the first day of September, 1905.

II.

That on or about the first day of September, 1905, the defendant being desirous of terminating the copartnership agreement set forth in paragraph 1 of plaintiff's complaint, and of acquiring the interest of the plaintiff therein, and in said saloon business, the stock on hand, stock ordered by the plaintiff, and the interest of the plaintiff in the unexpired liquor and cigar licenses, and it being agreeable to the plaintiff, the plaintiff and defendant entered into an oral agreement, by the terms of which the plaintiff conveyed and delivered to one M. Gordon at defendant's request, the stock on hand in said saloon business, and assigned and transferred to the said M.

Gordon the unexpired liquor and cigar licenses for conducting said business under the federal law, at defendant's request: and in consideration of the conveyance and delivery of plaintiff's interest in said business, the stock on hand, and the assignment and transfer of the federal licenses aforesaid, the defendant undertook, promised and agreed to and with the plaintiff as follows: That he would allow and give to the plaintiff the whole of the net profits realized from said saloon business between the aforesaid dates, set forth in paragraph 1 of the complaint, and that he would take over and pay for all stock ordered and not received by the plaintiff for said business, including one phonograph, and in further consideration thereof would give and execute to the plaintiff a lease upon the South one-half of that certain mining claim known as the "Metson Bench" placer claim, situated near Little Creek, in the Cape Nome Recording District, District of Alaska, for the following winter mining season of 1905 and the spring season of 1906, to expire on the first day of June, 1906, the plaintiff to pay as royalty for said lease forty per cent of all gold and other precious metals extracted from said claim during the term of such lease.

III.

That the plaintiff has performed, and did perform, on or about the said first day of September, 1905, each and all of the terms and conditions of said oral contract which on his part were to be kept and performed.

IV.

That the defendant failed and refused to perform

the conditions of said contract on his part in this: That he failed and refused to make, execute or deliver to plaintiff the lay or lease agreed to be given and made to plaintiff, as set forth in paragraph II of this complaint, but ignoring plaintiff's right thereto, made, executed and delivered to one J. Berger a lay or lease on said ground, and plaintiff was prevented from working said ground; and that the defendant refused to accept and pay for the phonograph ordered by the plaintiff and which the defendant agreed to accept and pay for under the terms of said contract aforesaid.

V.

That the said lay or lease agreed to be given by the defendant to the plaintiff as hereinbefore set forth was worth to the plaintiff the sum of Fifty thousand dollars, and plaintiff could and would have extracted from the ground promised and agreed to be let and leased to him by the defendant, over and above the royalty to be paid to the defendant, and the necessary expenses in working, mining and operating said ground, gold and gold-dust to the value of fifty thousand dollars, and that by reason of the failure of the defendant to make and give to the plaintiff said lay or lease plaintiff has been and is damaged in the sum of fifty thousand dollars.

Wherefore, plaintiff demands judgment in the sum of fifty thousand dollars, and for his costs and disbursements of this action.

WM. H. PACKWOOD,
C. D. MURANE and
O. D. COCHRAN,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

B. A. Chilberg, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action. That he has read the foregoing complaint, and knows the contents thereof, and the same is true as I verily believe.

B. A. CHILBERG.

Subscribed and sworn to before me on this the 31st day of July, 1906.

[Notarial Seal] O. D. COCHRAN,
Notary Public Dist. of Alaska.

[Endorsed]: No. 1559. In the Dist. Court of the United States for the Dist. of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Complaint. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jul. 31, 1906. Jno. H. Dunn, Clerk. By ————, Deputy. Wm. H. Packwood, Plaintiff's Atty. McB.

In the District Court of the United States for the District of Alaska, Second Division.

B. A. CHILBERG,
Plaintiff,

vs.

MAGNUS KJELSBERG,
Defendant.

Summons.

The President of the United States of America, to the Above-named Defendant, Magnus Kjelsberg, Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiff in the above-entitled action, on file in the office of the clerk of said Court, at the City of Nome, in said District, within thirty days from the date of the service of this summons upon you, or judgment for want thereof will be taken against you.

And you are hereby notified that if you fail to appear and answer said complaint within said time, the plaintiff will apply to the Court for the relief demanded in said complaint, to wit: For judgment against you in the sum of Fifty thousand dollars, and the costs and disbursements of this action.

Witness the Honorable ALFRED S. MOORE, Judge of the District Court of the United States for the District of Alaska, and the seal of said Court hereto affixed on this the 31st day of July, 1906.

[Seal of Court] JNO. H. DUNN,
Clerk of the above-entitled Court.
By Angus McBride,
Deputy.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed summons on the 31st day of July, 1906, and thereafter on the same date I served the same at Nome, Alaska,

upon Magnus Kjelsberg, by delivering to and leaving with him a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 31st day of July, 1906.

THOMAS CADER POWELL,
United States Marshal.
By D. J. Wynkoop,
Deputy.

MARSHAL'S COSTS.

1 Service $6.00

[Endorsed]: No. 1559. In the District Court of the United States for the District of Alaska, Second Div. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Summons. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Aug. 1, 1906. Jno. H. Dunn, Clerk. By ————, Deputy. Wm. H. Packwood, Plaintiff's Attorney. 2136. McB.

[Demurrer to Complaint.]

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG,
Plaintiff,

vs.

MAGNUS KJELSBERG,
Defendant.

Comes now the defendant above named and demurs to the Complaint of plaintiff on file herein and for ground of demurrer alleges:

That said Complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendant prays that he may go hence dismissed with his costs.

IRA D. ORTON,
R. G. HUDSON,
Attorneys for Defendant.

Service of the foregoing Demurrer is hereby admitted this 30th day of August, 1906.

O. D. COCHRAN,
Attorney for Pltff.

[Endorsed]: #1559. In the United States District Court, for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Demurrer. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Aug. 30, 1906. Jno. H. Dunn, Clerk. By ————, Deputy. L. Ira D. Orton, R. G. Hudson, Attorney for Defdt.

[Order Overruling Demurrer to Complaint.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special July, 1906, Term begun and held at the Town of Nome in said District and Division July 23, 1906.

Saturday, September 22, 1906, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, Acting U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now upon the convening of court, the following proceedings were had:

#1559.

CHILBERG,

vs.

KJELSBERG.

The demurrer to complaint was argued by counsel and overruled the defendant being granted twenty days to answer.

[Answer.]

In the District Court of the United States for the District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Comes now the defendant in the above-entitled action, and for answer to plaintiff's complaint alleges and denies as follows:

Alleges that on or about the 1st day of September, 1905, when the plaintiff and defendant dissolved co-partnership that the defendant agreed with the plaintiff and did give to the plaintiff all the profits of the business theretofore conducted by them as the Discovery Saloon and paid to the plaintiff one-half the value of the stock on hand, according to the inventory, and a considerable sum of money besides, the exact amount of which defendant does not know; that the half of stock on hand amounted to a sum of money considerably less than $1,000.00, but the defendant, in order to dissolve said partnership, paid the plaintiff for his half of the stock on hand, and as a condition for dissolving the partnership the sum of $1,000.00, and in addition thereto allowed the plaintiff to retain all of the profits of the business, and also agreed that he would take over and pay for all stock ordered and not received, which defendant thereafter did take over and pay for.

The defendant specifically denies that he agreed at any time, for the consideration stated in the complaint, or for any consideration whatever, that he would give or execute to the plaintiff any lease whatever on the Metson Bench Placer Claim, described in plaintiff's complaint.

Defendant further denies that he agreed to pay for and accept the phonograph mentioned in plaintiff's complaint.

Defendant further denies each and every allegation of Paragraph V of plaintiff's complaint.

Wherefore, defendant prays judgment that plaintiff take nothing by this action and that he have judgment for his costs.

IRA D. ORTON,
ROY G. HUDSON,
Attorneys for Defendant.

United States of America,
District of Alaska,—ss.

Ira D. Orton, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the above and foregoing Answer and knows the contents thereof and believes the same to be true; that the reason why this affidavit is made by affiant instead of the defendant personally is because the defendant is absent from the District of Alaska and is for that reason unable to make this verification.

IRA D. ORTON,

Subscribed and sworn to before me, this 18th day of October, 1906.

[Notarial Seal] IDA G. CHAQUETTE,
Notary Public in and for the District of Alaska, residing at Nome.

United States of America,
District of Alaska,—ss.

Due service of the within Answer is hereby accepted at Nome, Alaska, this 18th day of October, 1906, by receiving a copy thereof.

O. D. COCHRAN,
Attorney for Plff.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Answer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 18th, 1906. Jno. H. Dunn, Clerk. By ————, Deputy. D. Ira D. Orton, Roy G. Hudson, Attorney for Deft.

In the District Court for the District of Alaska, Second Division.

No. ——.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Reply.

Comes now the plaintiff in the above-entitled action and replying to the new matter set forth in defendant's answer, denies and alleges as follows:

I.

Denies all that portion of said answer commencing with the word "alleges" on the fourth line of said answer, down to and including the word "for" on the fourth line of the second page of said answer, and each and every part and portion thereof save and except as alleged in plaintiff's complaint.

Wherefore, plaintiff prays judgment as alleged in his complaint.

C. D. MURANE and
O. D. COCHRAN,
WM. H. PACKWOOD,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

B. A. Chilberg, being first duly sworn, deposes and says: That he is plaintiff in the above-entitled action; that he knows the contents of the foregoing reply and the same is true as he verily believes.

B. A. CHILBERG.

Subscribed and sworn to before me this 6th day of July, 1907.

[Notarial Seal] C. D. MURANE,
Notary Public in and for the District of Alaska,
Residing at Nome, Alaska,

Service of the within Reply is hereby acknowledged this 6th day of July, 1907.

IRA D. ORTON,
Defendant's Attorney.

[Endorsed]: No. 1559. In the District Court, District of Alaska, Second Division. B. A. Chilberg, Plaintiff, v. Magnus Kjelsberg, Defendant. Reply. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jul. 8, 1907. Jno. H. Dunn, Clerk. By ————, Deputy. C. D. Murane, Wm. H. Packwood, O. D. Cochran, Attorneys for Plaintiff. McB.

[Minutes of Trial—April 6, 1908.]

In the District Court for the District of Alaska, Second Division.

Term minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908, at 11 A. M.

Monday, April 6, 1908, at 11 A. M.

Court convened.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, Acting U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1559.

CHILBERG

vs.

KJELSBERG.

This case came regularly on for trial before the Court and a jury, W. H. Packwood and O. D. Cochran appearing for the plaintiff, and Ira D. Orton for the defendant. Case reported by Mrs. C. J. Nunne, Stenographer. The jury as empaneled and sworn to try the case was as follows: W. W. Purdy, M. J. Burns, F. H. Burley, Ed Sheehy, A. H. Anderson, J. F. Plein, Henry Wolf, Jos. Sheldon, James Wood, A. F. Jackson, J. B. Ross, Thomas Madden.

At 4:15 P. M. Court adjourned until Tuesday, April 7, 1908, at 10 A. M.

[Minutes of Trial—April 7, 1908.]

In the District Court for the District of Alaska, Second Division.

Term minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Tuesday, April 7, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, Acting U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court the following proceedings were had:

#1559.

CHILBERG
vs.
KJELSBERG.

Trial resumed; jurors all present. B. A. Chilberg and Andy Anderson were each sworn and testified on behalf of plaintiff until 12 o'clock noon, when the jury was admonished and court adjourned until 2 P. M.

2 P. M.

#1559.

CHILBERG

vs.

KJELSBERG.

Trial resumed; jurors all present; Andy Anderson on the stand for further examination. On cross-examination of witness defendant offered in evidence a pencil sketch of Metson Bench Claim which was admitted and marked Defendant's Exhibit "A," and thereafter Joseph Chilberg was sworn, B. A. Chilberg recalled and Eugene Chilberg sworn and testified until 4:50 P. M., when the jury was admonished and excused until 10 A. M. to-morrow.

[Minutes of Trial—April 8, 1908.]

In the District Court for the District of Alaska, Second Division.

Term minutes, Special April, 1908, Term begun and held at the Town of Nome, in said District and Division, April 6, 1908.

Wednesday, April 8, 1908, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. ALFRED S. MOORE, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. B. Grigsby, Acting U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now, upon the convening of Court the following proceedings were had:

#1559.

CHILBERG

vs.

KJELSBERG.

(All jurors not engaged in the trial of this case were excused until 2 P. M.)

Trial resumed; jurors all present; Eugene Chilberg on the stand for further examination and thereafter B. A. Chilberg was recalled and plaintiff rests.

DEFENDANT'S CASE.

Ira D. Orton moved the Court for a nonsuit, which motion after argument was overruled. Jake Berger was sworn and testified for defendant and defendant rests and the testimony closed. Defendant then moved the Court to instruct the jury in favor of the defendant which motion was overruled. The case was argued to the jury by O. D. Cochran and W. H. Packwood for plaintiff and by Ira D. Orton for defendant and at 12 o'clock noon the jury was admonished and excused until 2 P. M.

#1559.

CHILBERG

vs.

KJELSBERG.

Trial resumed; jurors all present. The Court instructed the jury in writing, exceptions to which were taken in the presence of the jury and before they retired, and at 2:25 P. M. the jury retired to consider of

their verdict in charge of bailiffs Lawrence and Hilfrich who were first duly sworn.

#1559.

CHILBERG

vs.

KJELSBERG.

At 3:15 P. M. the jury came into open court, all being present, and returned the following verdict:

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Verdict.

We, the jury in the above-entitled action, duly empaneled and sworn, find by our verdict for the plaintiff and against the defendant and assess the damages of the plaintiff at the sum of two thousand and 00/100 dollars—$2,000.00.

Dated April 8th, 1908.

M. J. BURNS,
Foreman.

The Court directed that the verdict be filed and placed of record and the jury was discharged from further consideration of this case and excused until 10 A. M. to-morrow. On motion of Ira D. Orton the entry of judgment was ordered delayed for three days.

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Verdict.

We, the jury in the above-entitled action, duly impaneled and sworn, find by our verdict for the plaintiff and against the defendant and assess the damages of the plaintiff at the sum of Two Thousand and 00/100 Dollars—$2,000.00.

Dated April 8th, 1908.

M. J. BURNS,
Foreman.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plf., vs. Magnus Kjelsberg, Deft. Verdict. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Apr. 8, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. McB.

[Motion to Set Aside Verdict and to Grant a New Trial.]

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Comes now the defendant, Magnus Kjelsberg, and moves the Court to set aside the verdict of the jury in the above-entitled action and grant a new trial on the following grounds:

I.

Insufficiency of the evidence to justify the verdict in this: that the evidence is insufficient to show that the defendant ever contracted or agreed to give the plaintiff the lease mentioned and described in the complaint.

II.

Errors in law occurring at the trial and excepted to by the defendant, as follows:

a. Error of the Court in refusing to give Instruction numbered I requested by the defendant, reading as follows:

"The jury are directed to find a verdict for defendant."

b. Error of the Court in refusing to give Instruction numbered I-A requested by the defendant, reading as follows:

"Under the evidence in this case no more than nominal damages can be allowed in any event."

c. Error of the Court in refusing to give Instruction numbered I-B requested by the defendant, reading as follows:

"In assessing the damages, in case you should decide in plaintiff's favor, you are instructed that the measure of plaintiff's damage is the value of the lease claimed by him at the time when the defendant breached the contract."

d. Error of the Court in refusing to give Instruction numbered II requested by the defendant, reading as follows:

"You are also instructed that in estimating these damages you should not take into consideration any uncertain or contingent profits which the plaintiff might or might not make from the working of the premises."

e. Error of the Court in giving the following instruction to the jury:

"That the rule of law is, that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement to lease, he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain."

f. Error of the Court in giving the following instruction to the jury:

"So far as money can do it the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such

an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased."

g. Error of the Court in giving the following instruction to the jury:

"Proof of the profits may be made by showing what profits were made under a like lease by other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in the same manner as the persons who had worked the same."

h. Error of the Court in giving the following instruction to the jury:

"The Court instructs the jury that if you find from the evidence that pay-dirt and gravel has been mined from said premises agreed to be leased to the plaintiff (if you find such an agreement existed), by other lessees of the defendant during the period of time for which plaintiff was to have a lease thereon; and you further find with probable certainty that the plaintiff, if he had been permitted to work said lease agreed upon would have discovered said pay-dirt and gravel, and would have worked and mined the same at a profit, you will find for the plaintiff, and in that case his measure of damages is that profit, if any, which would have been derived during the term of the lease agreed upon between the defendant and the plaintiff, if any such agreement existed, after first deducting the royalty agreed upon and reasonable costs of mining and extracting the values from said pay-dirt and gravel."

i. Error of the Court in giving the following Instruction to the jury:

"And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form somewhat more concrete, that if they find from the evidence that the defendant during the fall of 1905 entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, District of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another covering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profit which you shall find from the evidence, he would have made if the lease agreed upon had been fully performed by him."

j. Error of the Court in giving the following Instruction to the jury:

"You are instructed in this case to find for the plaintiff for some amount."

III.

Error of the Court in permitting the plaintiff, over the objection of the defendant, to prove the amount

of gold taken out of said claim by J. Berger under the lease from defendant.

IV.

Error of the Court in permitting evidence of what profit plaintiff might have made by reason of the lease in mining gold from said claim.

IRA D. ORTON,
Attorney for Defendant.

United States of America,
District of Alaska,—ss.

Due service of the within Motion for New Trial is hereby accepted at Nome, Alaska, this 11th day of April, 1908, by receiving a copy thereof.

O. D. COCHRAN,
Attorney for Plaintiff.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Motion for new trial. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Apr. 11, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. L. Ira D. Orton, Attorney for Defendant.

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG

vs.

MAGNUS KJELSBERG.

Order Overruling Motion for New Trial.

This cause came on regularly to be heard on Saturday, June 8th, 1908, upon defendant's motion for a new trial in the above-entitled cause.

The said motion was submitted to the Court without argument, and the Court being fully advised in the premises, after due consideration, orders that the said motion be, and the same hereby is, overruled.

Dated Nome, Alaska, June 13, 1908.

ALFRED S. MOORE,
District Judge.

[Endorsed]: No. 1559. In the District Court for the District of Alaska, 2d Division. B. A. Chilberg vs. Magnus Kjelsberg. Order Overruling Motion for New Trial. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. June 13, 1908. Jno. H. Dunn, Clerk. By ————, Deputy. Vol. 6, Orders and Judgments, p. 261. Comp. McB.

[Judgment.]

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG,
Plaintiff,

vs.

MAGNUS KJELSBERG,
Defendant.

JUDGMENT ENTRY.

On this day this cause came on to be heard upon the application of plaintiff for a judgment herein, in conformity with the verdict of the jury heretofore rendered, filed and entered in said cause, upon the trial thereof, and it appearing to the Court that said cause was heretofore tried before the Court and a jury, and duly argued and submitted upon the evidence produced upon said trial by the respective parties, and that at said trial, and on the 8th day of April, 1908, after the said trial jury had heard the evidence, the argument of respective counsel and the instructions of the Court—plaintiff appearing by O. D. Cochran and William H. Packwood, his attorneys, and the defendant appearing by Ira D. Orton of counsel, and the Court having presided at the trial of said cause, and having heard the evidence and argument of respective counsel, and having charged the jury and received said verdict, and ordered the same to be placed on file by the Clerk of said Court, which said verdict was in favor of plaintiff and against the defendant in the sum of two thousand dollars; and it further appearing to the Court that the motion of defendant to set aside said verdict and for a new trial has heretofore been overruled and denied:

It is therefore hereby considered, ordered and adjudged that plaintiff have judgment and have and recover of and from the defendant the sum of two thousand dollars, and his costs and disbursements

of this action taxed at $———, and that execution issue therefor.

Done and dated in open court on this the 17th day of June, 1908.

ALFRED S. MOORE,
District Judge.

[Endorsed]: No. 1559. In the District Court, District of Alaska, 2d Div. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Judgment Entry. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jun. 17, 1908. Jno. J. Dunn, Clerk. By ————, Deputy. Vol. 6, Orders and Judgments, p. 279. Comp. J. D. 2, page 63. O. D. Cochran and Wm. H. Packwood, Attys. for Plaintiff. McB.

In the District Court, District of Alaska, Second Division.

B. A. CHILBERG,
Plaintiff,

vs.

MAGNUS KJELSBERG,
Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause was tried before Hon. ALFRED S. MOORE, Judge of said Court, sitting with a jury, on the 6th, 7th and 8th days of April, 1908, Messrs. O. D. Cochran and W. H. Packwood appearing for plaintiff, and Mr. Ira D. Orton appearing for the defendant. The following proceedings were had:

(Testimony of B. A. Chilberg.)

A jury of twelve persons was sworn and impaneled, and thereupon B. A. CHILBERG, plaintiff, was duly sworn as a witness in his own behalf and testified as follows:

[Testimony of B. A. Chilberg, the Plaintiff.]

I reside in Nome and have lived in the District of Alaska since '98. I am a miner by occupation. I am acquainted with Magnus Kjelsberg. I entered into an agreement with Mr. Kjelsberg on or about September, 1905, with relation to the transfer of the Discovery Saloon business. Mr. Kjelsberg, the defendant, and myself were partners in the discovery Saloon at Nome, Alaska, at that time. These relations were terminated about September 1, 1905. The agreement was not in writing. Mr. Kjelsberg said he had an opportunity to make a trade with Mr. Gordon of his interest in the saloon building for an interest in the Metson Bench, and he would like also to have possession of the saloon business, and he asked me to give possession of the saloon business and everything. I told him I could not do it; that I had the license; that we had a license up to the 1st of November, but in my name; so he made me several propositions, at a number of different times, for me to give up the saloon to him, and finally he told me if I would give up or turn over the business to him that he would give me a lay on the Metson Bench, and that he would give me the profits that we had made, all of the profits we had made in the saloon for the pre-

(Testimony of B. A. Chilberg.)

vious year. I consented to this proposition. He came to see me a number of times with several different propositions and talked to me trying to get me to turn the business over to him, but I refused all of them until he made this proposition that he would give me also a lay on the Metson Bench and all of the profits of the saloon business for the previous year. After he had agreed to give me a lay on the Metson Bench I turned over the business. He wanted me to turn the business over to him just as soon as possible, the possession of the place, on account of Mr. Gordon wanting to get his family in. He wanted to get me out. He wanted me to transfer the license over to him, which was in my name. He paid me for my interest in the stock; that is, he bought out my interest in the stock, which we had on hand, in money, and his share in the profits for the previous year, and when he did that he says to me, "I will give you a lay. I will make you out a lease also on the Metson Bench." I agreed to that. He said that he was in a hurry to get into possession of the place, so that Gordon could send out for his family to come in that fall, and that he would give me a lease or make out a lease to me of the Metson Bench later, to which I agreed. He never did make the lease. I asked him for a lease a number of times. I was to have a lease on the south half of the Metson Bench. Kjelsberg said he would give it to me before he went out and also before he was leaving I went to see him just a few hours—about an hour—before the steamer left, because I knew

(Testimony of B. A. Chilberg.)

he was going out, and I went to see him, and he said, "Well, I have not made out that lease now, and I don't know that I will have time to make it out, but I will leave a letter with Gene (that is Gene Chilberg) for him to make out a lease for you." He said, "I will have him make out a lease for you." I spoke to Gene Chilberg about it after Mr. Kjelsberg left. He didn't execute the lease. He said he would write out to Mr. Kjelsberg and find out what to do with Mr. Berger. It seems that Kjelsberg had promised Mr. Berger a lease, and that he would have to write out to Mr. Kjelsberg what to do about it. I asked Mr. Chilberg for a lease after that, after Mr. Kjelsberg had gone out. Gene said that he had given Mr. Berger a lease because he had not received any word from Kjelsberg not to. The terms of the lease were that the royalty was to be 40% and the lease was to run to the middle of June, 1906. It was to commence in October—September. It was to commence the 1st of September, 1905. Mr. Berger afterwards worked the ground under a lease. He worked all winter. I don't know just exactly what time he did commence work. He was in possession there during the winter, or during the fall of 1905, and the winter and spring of 1905 and 1906. He was in possession of the very same ground that I was to have a lay on. This ground was situated on Little Creek, opposite, I think it is opposite to Discovery Claim on Little Creek in the Cape Nome Recording District, District of Alaska. I never did receive a lease from Mr. Kjelsberg upon the prop-

(Testimony of B. A. Chilberg.)

erty. I intended to work the southerly half of that claim under the lease that Mr. Kjelsberg had promised me.

Q. How did you intend to work it?

Mr. ORTON.—That is objected to as entirely immaterial, what the intentions on his part were, and improper upon the question of damages, and it being certainly an attempt to get incompetent question upon the question of damages in this case.

The COURT.—He must show that he intended to work the claim; objection overruled.

Exception taken by the defendant.

A. I was going to put down a shaft, and if I found pay then I was going to put in a hoist and work it just the same as any other claim.

Q. Do you know where Mr. Berger sunk his shaft afterwards?

Mr. ORTON.—Objected to as incompetent, irrelevant and immaterial and as having no bearing whatever upon the question of damages.

The COURT.—Overruled.

Exception taken by the defendant.

A. Yes, sir.

Q. How far, about, was his shaft from the line? That is, about how far from the line dividing the claim in the middle?

Mr. ORTON.—Objected to as immaterial.

The COURT.—Objection overruled.

Exception taken by the defendant.

A. I don't know exactly how far from the line it was; I could not tell you just how far it was; all I

(Testimony of B. A. Chilberg.)

could say is that he sunk his shaft upon the piece of ground that I was to have a lay on.

The witness, continuing, testified as follows: I know Mr. Andy Anderson. He was working upon the north part of the Metson Bench.

Mr. Kjelsberg has refused to give me a lay on this claim up to the present time. He refused every time I asked for it and he has never given me a lease.

On being cross-examined the witness testified as follows:

The defendant, Mr. Kjelsberg, and myself were partners in the Discovery Saloon business. We had each contributed an equal amount when we entered into partnership in that business and each owned an equal interest in the business. Then Mr. Kjelsberg and myself dissolved partnership and when we dissolved partnership Mr. Kjelsberg gave me all the profits that he and I had made in the business for the year previous, amounting to some fifteen or sixteen hundred dollars, and he paid me for my share of the stock on hand and also for the unexpired term of the license. I remember signing a receipt and giving it to Mr. Kjelsberg when he paid me, and he gave me an additional sum of money—a $20.00 gold piece—in addition to everything else he had agreed to give me. He simply made me a present of it. I supposed he did. I don't know why he did it.

Q. Now, Mr. Chilberg, you say that you had a number of conversations with Mr. Kjelsberg and that it was finally agreed in the final conversations

(Testimony of B. A. Chilberg.)

that you had that Mr. Kjelsberg said that he told you that he would give you a lease on the south half of the Metson Bench; that he would leave instructions with Gene Chilberg to that effect, that he would make you a lease to the Metson Bench? *With Gene Chilberg, yes, sir.*

Q. This was after you had agreed to the terms of the settlement that he was to give you all the profits of the business for a year previous; he was to pay you for your share of the stock on hand, including the unexpired term of the license, and then after that he said to you—

A. Yes, sir, he agreed to that—

Q. (Continuing.) After he had agreed to do all that then he says to you, "I will give you in addition to that a lay or a lease on the south half of the Metson Bench"? A. Yes, sir.

Q. He said, "I will give you a lease on the south half of the Metson Bench to expire June 15th, 1906, and at forty per cent royalty—" even named the royalty that he would give you?

A. Yes, sir, he certainly agreed to give me a lease like that.

Q. Now, why didn't you go out there and go to work upon it? A. Why didn't I?

Q. Yes, sir, why didn't you go out there and go to work?

A. Because I wanted to have my lease, and it was too early then any way to go to work.

Q. Didn't he tell you that he would give you a lease? A. Yes, sir.

(Testimony of B. A. Chilberg.)

Q. You were to have a lease on the south half of the claim at the royalty of forty per cent.

A. Yes, but I was not ready then to go to work; I thought it was better not to be in a hurry, at that time of the year.

Q. Well, you had a lease, when a man told you you could have a lease upon a piece of ground, at forty per cent royalty, for a year, you had a lease, didn't you?

A. I had no object in going to work under a lease until it was in writing; I was not ready; I was not aware that I had to go to work until I was ready, even it I had a lease.

Q. Well, you knew that a lease for one year didn't have to be in writing, didn't you? That if a man promised you a lease, named the royalty, for a year or less than a year, that that was just as good as a lease in writing, didn't you?

A. Yes, I knew that a lease for a year—that a verbal lease was good, for a year—

Q. Now, Mr. Kjelsberg says to you "You shall have a lease on the Metson Bench"?

A. Yes, sir.

Q. At forty per cent royalty? A. Yes, sir.

Q. To expire next June? A. Yes, sir.

Q. Did he give you the exact date in June?

A. No, I do not know that he did.

Q. Well, he says "After clean-up," didn't he?

A. Yes, that was about it.

Q. It was to expire after clean-up time?

(Testimony of B. A. Chilberg.)

A. Yes.

Q. Well, you understood that it was to expire after clean-up time, and he went away with the matter standing in just that way? A. Yes, sir.

Q. You know that he intended it in just that way? A. Yes, sir.

Q. Mr. Kjelsberg never personally refused to give you a lease, did he?

A. No, sir, he did not; he never did, personally.

Q. You came to see him just before he went away and he says to you, "Go down and see Gene, and he will fix it up with you"?

A. He said he would leave a letter at the Discovery Saloon. He said he would leave a letter at the Discovery Saloon telling Gene to execute a lease to me.

Q. Telling Gene to execute a lease to you?

A. Yes, sir.

Q. Now, you know that Mr. Chilberg never knew from Mr. Kjelsberg personally until after clean-up time the next year, don't you?

A. I know that he left Nome.

Q. After you had this conversation with him when he told you that he would leave a letter of instructions at the Discovery Saloon for Gene to execute a lease to you for the south half of the Metson Bench you know he never saw Gene after that until after the clean-up time the next year, don't you?

A. I know he left Nome—

Q. That conversation was the very afternoon on which he left Nome, was it not?

(Testimony of B. A. Chilberg.)

A. Yes, sir, within a short time of when he left, a few hours, yes, sir.

Q. Now, you were anxious to get this lease in writing because you wanted to have some evidence of it. That was your idea about it, was it?

A. Certainly.

Q. Now, when Mr. Kjelsberg went away he went away you say the same day, and he didn't see you again—he went outside to the States?

A. Yes, but he also said—he promised me that before he left, before he went away to leave a letter for Gene, and he never done so.

Q. Well, you went up there immediately, did you? You went there again to the saloon?

A. No, it was a hard time—it was close onto 11 o'clock before I got up there again and found that he never had left it for him—I don't know just when it was I did find out, a few days perhaps when I asked Gene for a lease, or if Mr. Kjelsberg had left instructions with him to execute me a lease, and he said "No, he had left Nome without doing so."

Q. This conversation you had with Mr. Chilberg subsequent to the time that Mr. Kjelsberg had left Nome for the States?

A. Yes, sir; several days, possibly; I could not tell you just the date now.

Q. Now, you said to him when you met him "Didn't Magnus leave a letter with you telling you to execute a lease to me for the south half of the Metson Bench, for forty per cent, until after clean-up time, next year?"

(Testimony of B. A. Chilberg.)

A. Something to that effect.

Q. And that was the substance of your conversations you had with Mr. Kjelsberg in reference to the matter, and the matter that you finally agreed upon?

A. Yes, sir.

Q. You had several conversations with him prior to that? A. Yes, sir.

Q. And in the conversation you had with him the day—the very day before he went to the outside you say he promised you a lease on those terms?

A. Yes, sir, several conversations which subsequently came to that end.

Q. Now, you state, I believe—I want to understand you correctly, and I will ask you again: Mr. Kjelsberg says to you: "You shall have a lease on the south half of the Metson Bench, at forty per cent royalty, to expire after clean-up time next June"? A. Yes, sir.

Q. This was about eleven or twelve o'clock, in the Discovery Saloon, the very same day that he left Nome? A. Yes, sir.

Q. Then he went outside to the States for the winter and came back after clean-up time the next July, didn't he?

A. Yes, sir— well, I don't know that he came in in July; I think it was about the next June, sometime.

Q. Well, it was after clean-up time—after the clean-up, any way?

A. Yes, sir—oh, yes, it was.

(Testimony of B. A. Chilberg.)

Q. But you never undertook in any way to go out and go to work on the ground?

A. No, sir, I did not.

Q. Never sunk any shafts to try and find the pay, in any way? A. No, sir.

Q. Never attempted in any way to work the ground, or take possession in any way?

A. No, I never did.

Q. You never did? A. No, sir, I never did.

Q. When did you say this lease was to commence when you had this conversation when he says to you "You shall have a lease on the Metson Bench" to commence when?

A. Well, the date was not stated, when it was to commence.

Q. The date was not set?

A. No, sir, but he told me at the time, when I signed the receipt when I inquired in regard to this lease, he said, "I will give you a lay"—he said, "I will leave a letter to Gene Chilberg to give you a lay, to execute a lease to you"—before that when I signed over the receipt when he said he would give me the lay, I said, "There is no particular hurry; I don't think I will go to work until about the first of October, any way."

Q. And he said that was all right, did he?

A. Yes, he said that he would—yes, he said that was all right; that he would make it out in time for me.

(Testimony of B. A. Chilberg.)

Q. Now, when you first had your first conversation with him about closing up the business he first offered to give you half the profits?

A. Yes, sir.

Q. Then he said to you "I will add my profits to that and give you all the profits of the business, and will also give you a lay on the Metson Bench on the same terms as the Anderson lay"; he said to you, "I will do that."

A. That was not the first conversation.

Q. I meant to say you said to him that you would not accept half the profits; then he said that he would give you all the profits of the Discovery Saloon business and I will also give you a lay on the Metson Bench on the same terms that Andy Anderson has his lay. Then you said to him that you would do that.

A. That was one time, but it was not the first time we had a conversation about it.

Q. Well, that was the time that he agreed to that whole proposition? A. Yes, sir.

Q. He said, "I will do that"? A. Yes, sir.

Q. Those were his words?

A. I don't know those were his exact words.

Q. Well, you were speaking to him and you said in regard to this proposition, "Well, I will do that, provided you will give me a lay on the Metson Bench on the same terms as the Anderson lay," and in reply to that Mr. Kjelsberg said "I will do that"?

A. Yes, sir.

(Testimony of B. A. Chilberg.)

Q. That was in the presence of Gene Chilberg, was it? A. Yes, sir.

Q. Now, that was substantially everything that was said at that time, was it not?

A. But I never called the Anderson lay—I never mentioned the terms of the Anderson lay; I never went into that.

Q. But you knew what the terms of the Anderson lay were, did you not? A. Yes, sir.

Q. You knew when it commenced and when it ended? A. Yes, sir.

Q. Knew what the royalty was?

A. Yes, sir.

Q. And as near as you can recollect that was about all the words that were spoken between you at that time? A. Yes, sir.

Q. That is in regard to the lay?

A. But there was more said than that.

Q. I mean with regards to the giving you of a lay?

A. I think it was, as near as I can remember, in regards to giving me the lay, at that time.

Q. Now, just as soon as he said that you went to taking inventory preparatory to turning the property over to Gordon, right away, did you?

A. Yes, sir.

The witness continued to testify as follows: I had never been on this part of the Metson Bench personally; had never taken any pans or anything of that kind from that portion of the claim. There were holes sunk on it. I had never done any prospecting

(Testimony of B. A. Chilberg.)
on it myself at that time. I couldn't tell just on what part holes had been sunk. I had not walked over each and every foot of it or paid any attention to it. When Eugene Chilberg was present at this conversation when Mr. Magnus Kjelsberg said "I will do that," in answer to this proposition. I don't know why he happened to be there. This Mr. Gene Chilberg is a relative of mine, a nephew. I don't know anything of my own knowledge about what was taken out of the Metson Bench.

On redirect examination the witness testified further: I met Mr. Kjelsberg again in the summer of 1906, but had no conversation with him about this lease. I believe I stated that the saloon license expired November 1, 1906. I meant 1905.

[Testimony of Andy Anderson, for Plaintiff.]

ANDY ANDERSON, a witness on behalf of the plaintiff, testified as follows: I reside in Nome and have resided there since '99; am a miner by occupation; am familiar with mining around the vicinity of Nome. I was mining on the Metson Bench; am acquainted with the southerly portion of the Metson Bench. I performed work on that portion of the Metson Bench.

Q. Under what circumstances?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial and not a proper element of damages in any way.

Mr. COCHRAN.—We want to show what they took out of the ground in dispute.

(Testimony of Andy Anderson.)

Mr. ORTON.—Objected to as irrelevant, incompetent and immaterial and too speculative and remote for a proper basis of damages.

The COURT.—During the term of Mr. Chilberg's lease, upon the very section of ground covered by this lease, part of the identical portion of the Metson Bench? I think that is proper.

Mr. COCHRAN.—Yes, your Honor. We propose to show what was taken out of the identical portion of the Metson Bench during the very same time for which a lease was promised to him; then we propose to follow that up by showing the cost of taking it out. That is certainly proper.

Mr. ORTON.—We object to it as calling for an improper element of damage. The proper element of damage in a case on an agreement to give a lease would be the value of the lease; not of any profits that might have been made upon it.

The COURT.—I think this question is proper. The proper measure of damage in a case of this kind would be the natural flow from the lease or contract, and if the plaintiff shall be able to establish what those profits are or might have been with any degree of certainty he should have the right to do so, undoubtedly.

Objection overruled.

Exception taken by the defendant.

Q. You may answer the question then, Mr. Anderson.

The COURT.—Of course, anything like speculative or conjectural or future profits would naturally

(Testimony of Andy Anderson.)

be incompetent. The law requires that those profits be stated with absolute certainty in matters of this kind, or requires the greatest degree of certainty. Go ahead.

Q. Answer the question. Under what circumstances did you work that claim?

A. I worked a lease in partnership with Mr. Berger on the Metson Bench, as I had a lease on the north half and he had a lease on the south half, and we joined together and went in as one, and worked it as one, and worked it that way during the winter of 1905 and 1906.

Q. Now, you may state whether you worked out any ground south of the line upon the ground leased to Berger, that is to say, the south half of the claim?

Mr. ORTON.—That is objected to, if your Honor please, as being irrelevant, incompetent and immaterial, and not a proper element of damage in the case, as being an improper and incompetent evidence on the question of damage.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Yes.

Q. Now, you may state about what proportion of that ground you worked out.

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, uncertain and indefinite, and not a proper measure of damage or not a proper element of damage in this case.

The COURT.—Objection overruled.

(Testimony of Andy Anderson.)

Exception taken by defendant.

The COURT.—Now, your attention is called to the south half of the claim.

The WITNESS.—Yes, I understand.

Q. Answer the question.

A. We worked out a part I should judge about two hundred feet from the northeast end line down a little ways—I could not say just how far the distance was—in a kind of a circle,—I should judge, perhaps, fifty feet from the line; the length of it I would not be able to state now.

Q. Fifty feet from the line?

A. Fifty feet, yes, from the division line between the two lays, or from the center of the claim.

Q. Dividing it north and south?

A. Yes; I think that would be about fifty feet wide, north and south.

Q. And about how long?

A. That I could not state at present; I never took any measurements that way that I can remember of, but it was in a kind of a circle-like, or in kind of a shape like a half-moon.

Q. Did you discover any pay there?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, and incompetent upon the question of damage, not a proper element of damage in this case. There is no presumption that this witness and the plaintiff would sink in the same place, were the plaintiff working the lay—

(Testimony of Andy Anderson.)

The COURT.—Objection overruled.

Exception taken by defendant.

A. There was some pay there.

Q. Did you take out the pay there?

Mr. ORTON.—This question is objected to on the grounds that it is irrelevant, incompetent and immaterial, and as not being a proper element of damages in the case, and not being proper or competent evidence on the question of the measure of damages.

The COURT.—We overrule the objection. Of course, if there was a well-defined paystreak it is competent to prove and to show that the plaintiff would have undoubtedly sunk in the same place that this witness and other laymen did; otherwise I do not think it would be material or a proper measure of damages.

Exception taken by defendant.

Mr. COCHRAN.—We will prove by the plaintiff himself that he would have sunk from the indications by other workings in the same neighborhood upon identically the same ground and upon identically the same position as these other workmen did, and that if we had been permitted to work the ground the plaintiff would have taken out the same pay.

Mr. ORTON.—I don't think that kind of evidence is competent, if your Honor please. I also object to the statement of counsel because the Court has already ruled in their favor and there is no occasion for a speech to the jury at this time; there is nothing before the Court.

(Testimony of Andy Anderson.)

Mr. COCHRAN.—We were presenting it at this time for the reason that we intend to follow this testimony with the testimony of the plaintiff himself that we would have sunk upon that ground if the defendant had complied with his contract, which is the best evidence that the circumstances will permit, and we have a right to show the amount of pay extracted from the workings upon this ground by the best evidence the circumstances will permit—which goes to show the damages that might accrue to the plaintiff by reason of the failure of the defendant.

The COURT.—Of course, under the Court's view it devolves upon you to prove with reasonable certainty that you would have realized profits had the defendant performed his part of the contract.

Mr. COCHRAN.—We are going to show this showing that the pay lies upon a line extending from the northern portion of the claim to the southern portion of the claim; that during the period of this lease that pay was discovered in a well-defined paystreak adjoining this ground involved in this lease, right immediately adjoining it on the north, and extending in a well-defined paystreak through the southerly portion of the claim. The evidence will show that we would have started our prospecting where this pay was found, and that we would then have struck this pay had we been permitted to work, if they had complied with their contract, and would have developed the same paystreak that Mr. Anderson and Mr. Berger, laymen upon this very ground and would have derived the same profits because we

(Testimony of Andy Anderson.)

expect to show that they had examined the ground before.

Mr. ORTON.—We certainly object to the statement of counsel, because there is nothing in the record in this case for him to base such statements upon, and nothing whatsoever to show that Mr. Chilberg would have sunk his prospect shafts in the same place that Anderson and Berger did, or that he would have struck the same paystreak, or anything of the kind.

(After argument.)

The COURT.—It seems to me that there might be two methods of proving what the damages could be in this case: One is to call witnesses to testify upon opinion simply as to what the value of this lease was, and the mode that the plaintiff has now adopted; that is, of trying to ascertain what the plaintiff could have realized from the lease had the defendant not committed the breach—

Mr. COCHRAN.—I agree with the Court except that I think the words "would" is proper instead of the word "could."

Mr. ORTON.—We shall object to this line of testimony upon the grounds before stated; that is that it is incompetent, irrelevant and immaterial, and not a proper element of damages, and as incompetent evidence to prove the proper measure of damages in this case.

The COURT.—Objection overruled; proceed.

Exception taken by defendant.

A. Yes, sir.

(Testimony of Andy Anderson.)

Q. Did you prospect the ground south of the line, adjoining it on the south, in the southerly portion of the claim that Berger had leased?

A. Why, the pay was continuous from the north side, through from the northerly half to the southerly half of the claim.

Q. And you followed the pay across the line?

A. Yes.

Q. State to the jury, Mr. Anderson, how you worked this ground?

Mr. ORTON.—Objected to as incompetent, irrelevant and immaterial and not a proper element of damages, and as calling for incompetent and irrelevant evidence on the question of the measure of damages.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Why, we sunk a shaft on the south half of the claim, and ran a drift, in that drift we stopped where we were on the north half, and connected the two, and then we put up a hoist on that south shaft and took out a dump there; that is we worked the two faces as one, connected them and worked them together so that we hoisted out of the two shafts.

Q. And what did you do with the dirt?

A. We piled it up.

Q. From the southerly portion?

The COURT.—I would like to ask one question before we go any further.

Q. How soon after you commenced working on the south half of the Metson Bench did you find the pay?

(Testimony of Andy Anderson.)

A. Well, we found it about the same time.

Q. Well, how soon? What is the date? How soon after you began?

A. After we began prospecting?

Q. Yes.

A. About—let me see—about a month.

Q. About a month? A. Yes, sir.

The COURT.—Proceed.

Q. (By Mr. ORTON.) And when did you begin?

A. We began in October, the latter part of October.

Q. 1905? A. Yes, sir.

Q. (By Mr. PACKWOOD.) Did you find the pay in the first shaft you sunk on the south side of the ground, I mean?

Mr. ORTON.—That is objected to as immaterial.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Well, I don't remember which shaft we got bedrock with first; we found, however, we found pay on the north half, in the shaft on the north half; in the shaft on the south half the pay was weak; we didn't hardly consider that it was pay there at the time when we found it.

Q. Did you drift from that shaft afterwards?

A. Yes, sir.

Q. State whether or not you discovered pay in the bottom of the shaft upon this ground in controversy?

(Testimony of Andy Anderson.)

A. Well, there was not what you would call pay in the bottom of that shaft.

Q. On the south half?

A. Not on the south half, in the bottom of the shaft, not what you would call pay, no.

Q. You ran your drifts from the two shafts, did you?

A. Yes, we drifted and we connected the two shafts. When we had connected them we started drifting from the north, towards the other shaft, and the pay was between as we continued, showing that we were on the south edge of the pay, like.

Q. What did you do with the dirt that you took from the south half of the claim?

A. All of the dirt was mixed from the south half and from the north half; that is, we worked the whole face together, as one face. In the panning we were helping each other, and in setting points, and so forth, but we were working it all in the one face.

Q. Did you pile it all in one dump?

A. No, from the whole claim we had three dumps; we had one of them laid on the north half and one on the south half, but the dirt was commingled in the southern dump.

Q. How much did you take out of the south dump in gold-dust?

Mr. ORTON.—I object to that question, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, and also that it is not shown to be within the knowledge of this witness,

(Testimony of Andy Anderson.)

and also because it is not being the proper measure of damages.

Q. (By Mr. ORTON.) Do you know, Mr. Anderson, with any degree of certainty?

A. I don't know accurately, only the best I can remember, in each end, in the south dump, was somewheres between forty and forty-five thousand dollars.

Mr. ORTON.—We move to strike out the latter part of the answer, to wit: "In the south dump was somewheres between forty and forty-five thousand dollars," as not being responsive to the question, being a voluntary statement without any question being asked of the witness, or any opportunity to counsel to object.

The COURT.—We strike it out; that is, we strike out the last part of the answer.

Mr. ORTON.—My motion goes only to the last part, your Honor.

The COURT.—Yes.

Q. Can you state about what you took out of the south dump, in value?

Mr. ORTON.—That is objected to, if the Court please as being irrelevant, incompetent and immaterial, and because it already appears from the evidence of this witness that the south dump was taken from both sides, the north and the south half of the claim, and that the dirt was commingled from the two sides, and he certainly could not testify as to the value of the portion from the south half.

The COURT.—Objection overruled.

(Testimony of Andy Anderson.)

Exception taken by defendant.

Mr. ORTON.—I would like also to add that Mr. Kjelsberg had nothing whatsoever to do with the commingling of the dirt in this dump, or that it was not in any way connected with his authority.

The COURT.—Objection overruled.

Exception taken by defendant.

Q. Do you know anywheres near what was taken from the south dump, in value, Mr. Anderson?

Mr. ORTON.—We make the same objection, that it is irrelevant, incompetent and immaterial, not the proper measure of damages, and because it already appears from this witness' testimony that the dirt in the south dump was commingled from the two sides of the claim, and therefore he could not testify as to the value of the portion taken from the south half.

The COURT.—Objection overruled.

Exception taken by defendant.

A. I can't state accurate.

Q. Well, about as near as you can state it.

Mr. ORTON.—I desire to object to this question upon all the grounds as the last preceding question, to wit: Objected to on the grounds that it is irrelevant, incompetent and immaterial and not the proper measure of damages in this case, and upon the further grounds that the witness has just answered that he cannot state with any degree of accuracy, that the dirt was commingled in the south dump from the two sides of the claim, and therefore any testimony he would give as to the value of the

(Testimony of Andy Anderson.)

gold-dust taken from the south dump would be irrelevant, incompetent and immaterial in this case.

The COURT.—Objection overruled.

Exception taken by defendant.

A. The nearest I can say, there was about in the south dump, the amount was somewheres between forty and forty-five thousand dollars.

Q. There was between forty and forty-five thousand dollars?

A. I think so; I cannot be positive because we only estimated it when we cleaned up out there.

Q. Well, are you positive that there was forty thousand dollars?

A. Yes; I think there was over forty thousand.

Q. Did you prospect the ground as you went between the south half and the north half, on the line, in the face?

A. Yes. But that didn't all come out of the south half, you understand, that forty thousand—

Q. Can you say with any degree of certainty about what portion in value of that dump came out of the south half of the claim?

Mr. ORTON.—Yes, or no, Mr. Anderson, whether you can or not tell with any degree of certainty—that is the question, now.

A. I can't state it accurate, no.

Q. With any degree of certainty, is the question.

Q. (By Mr. PACKWOOD.) The question is "Can you state with any degree of certainty the amount in value that came out of the south dump, that came out of the south half of the claim?"

(Testimony of Andy Anderson.)

Mr. ORTON.—Just yes or no; that is all you are to answer now.

The WITNESS.—I don't think I understand the question, the way you state it.

Mr. ORTON.—I would ask the Court to instruct the witness what the question is.

The COURT.—I think the meaning of the examiner is, "Can you tell without answering what the amount was at 11, can you state with any degree of certainty—can you estimate without it being more in the nature of a guess, what amount of gold-dust was taken from the south half of the claim?"

A. Well, it would be party guess; I could not say anything else, because, of course, we panned all along, as we went along, and from the way the ground prospected, what the portion that we worked out, it would be about, I think twenty thousand.

Q. You say you panned the ground as you went along? A. Yes, sir.

Q. You are a practical miner, are you, Mr. Anderson?

A. Well, I don't know; there might be better.

Q. (By the COURT.) I don't think I understand your answer; you said twenty thousand dollars—

Mr. ORTON.—The witness stated that it was twenty thousand dollars from the south side. I did not have any opportunity to object to this answer, your Honor, and I now move to strike out of the record, for the reason that the question which was asked the witness was "whether he could tell with any de-

(Testimony of Andy Anderson.)

gree of certainty what portion of the gold or gold-dust taken from the south dump came from the south half of the claim," and the witness voluntered the latter portion of the statement that there was about twenty thousand dollars, so I move that that portion of his answer be stricken out.

The COURT.—We strike it out; that portion of the answer may be stricken out as not responsive and a voluntary statement on the part of the witness.

Q. (By Mr. PACKWOOD.) How long have you been mining, Mr. Anderson?

A. About ten years.

Q. You are familiar with mining in this vicinity?

A. Yes.

Q. You are familiar with mining this class of ground? A. Yes, sir.

Q. I believe you stated that you panned the faces of your drifts, as you went along?

Q. Now, can you state from your knowledge as a miner—a practical miner, and from your pannings and from the prospects that you took from the portion of this ground lying south of the line—from the south half of the Metson Bench, the amount of pay gravel that was taken from the south half?

Mr. ORTON.—We object to that question.

Mr. PACKWOOD.—I would like permission to re-state my question, if the Court please.

The COURT.—I think you had better re-state it.

Q. Can you state from your knowledge as a practical miner, from the pannings and prospects taken from that portion of the ground lying south of the

(Testimony of Andy Anderson.)

line between the north half and south half of the Metson Bench, the amount of gold or gold-dust that was taken from the south portion of the claim by you in your operations upon the ground during the winter of 1905 and 1906?

The COURT.—Answer that question yes or no. Can you state?

A. Yes, with reasonable certainty I think I could.

Q. Well, what was the amount?

Mr. ORTON.—We object to the question as being irrelevant, incompetent and immaterial and not a proper element of damage in the case, and irrelevant evidence on the question of damages.

The COURT.—Objection overruled.

Exception taken by defendant.

A. About twenty thousand dollars.

Q. In your opinion would it be less or more than twenty thousand.

Mr. ORTON.—We object to pursuing this matter any further, if the Court please, than is necessary; he has answered twenty thousand dollars, and that should be enough.

The COURT.—Objection overruled; we want to ascertain the certainty of the witness, as near as possible.

Exception taken by defendant.

Q. Answer the question.

A. I think it would be twenty thousand.

(Question read.)

A. I am pretty sure it would be twenty thousand; fully twenty thousand dollars.

(Testimony of Andy Anderson.)

Q. When you say "Fully Twenty Thousand Dollars," do you mean to say that you have overestimated it at Twenty Thousand?

A. Yes, sir.

Mr. COCHRAN.—I think the witness has made a mistake, if the Court please, in his answer, when he has said it was "overestimated at twenty thousand."

Mr. ORTON.—I don't know what mistake he means; he answered counsel's question that he meant that twenty thousand was an overestimate, and I object to the statement of counsel, as being highly improper. He is putting himself up as contradicting the witness, and it is improper, any way, in the presence of the jury—

Mr. COCHRAN.—I may have misunderstood him myself; I only wanted it to be correct in the record.

Q. I will ask you whether you in your estimate of twenty thousand dollars, fully twenty thousand dollars, you had over or under estimated the value?

Mr. ORTON.—I object to counsel cross-examining his own witness in this way; there is nothing for the witness to explain.

The COURT.—No, I think the jury understand it.

Q. Did you mean to say that you were over estimating the value when you stated Twenty Thousand Dollars, or that you were under estimating it—the amount of it, to the best of your knowledge?

Mr. ORTON.—That is objected to as being highly improper, and as irrelevant, incompetent and imma-

(Testimony of Andy Anderson.)

terial, and also because the question has just been answered, and there is nothing before the jury for the witness to explain or correct.

The COURT.—I think the witness hardly understood the question when he said he considered that Twenty Thousand was an overestimate; he said before that he thought it was fully Twenty Thousand; then when counsel asked him if he considered it an over estimate, he said yes. Now, counsel want to know whether he thinks he put it too high, or too much, or whether he considered he had put it too low. To that question he answered that he considered it an over estimate. So there is somewhat of a contradiction, perhaps, in the two answers, which counsel are trying to straighten out. We overrule the objection.

Exception taken by defendant.

Q. What would be the reasonable and ordinary expense for extracting that pay-dirt, mining and sluicing it up in the ordinary methods of mining in this District, Mr. Anderson?

Mr. ORTON.—That question is objected to on the grounds that it is irrelevant, incompetent and immaterial, and not a proper element of damage, and upon the further ground that it has not been shown to be within the presumed knowledge of the witness.

The COURT.—Overruled.

Exception taken by defendant.

A. Well, that is a hard question to answer.

Q. Well, as near as you can answer, from your mining operations in this country.

(Testimony of Andy Anderson.)

Mr. ORTON.—I make the same objections as to the last preceding question, as follows: Objected to as incompetent, irrelevant and immaterial, and not a proper element of damage in this case, and as not being within the presumed knowledge of the witness.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Well, it might cost thirty per cent to mine that ground.

Q. Would it cost any more than that?

A. It might cost more, without a hoist there and machinery and everything there on the ground; figuring that in the cost of what it cost us to mine the ground it would cost more than that, because it is low ground.

Q. Did you think that it cost you any more than that?

A. Well, that is pretty hard to say because we never kept no account of the ground, because we worked it all together as one—we worked it all in one.

Q. Do you think that it cost you thirty-five per cent?

A. I don't think that it cost any more than thirty-five per cent, any way.

Q. If it was mined in the same manner that you mined it would it have cost any more than that?

A. I don't think so.

Q. You don't think it would have cost more than thirty-five per cent? A. No, sir.

(Testimony of Andy Anderson.)

Q. To get that clear before the jury I will ask you this question: You may state whether or not in your opinion and according to your best judgment, the south half of the Metson Bench produced more than twenty thousand dollars or less than twenty thousand dollars from your operations of that portion of the ground during the winter of 1905 and 1906?

Mr. ORTON.—To which defendant objected on the ground that the question is irrelevant, incompetent and immaterial, as not being a proper element of damage, and also in addition to all these objections we make the further objection which I understand your Honor has already ruled upon, the question has already been asked and answered.

The COURT.—We overrule the objections.

Exception taken by defendant.

A. Well, I don't think—it might have been a little more, but it would not be much, and I don't think that it was less; I feel that it was not less.

Mr. PACKWOOD.—That is what we wanted to make clear before the jury, if the Court please.

On cross-examination, the witness testified as follows: I don't think it cost more than 35% to take it out. Of course this was owing to the fact that we had an outfit on the ground and I had the ground partly opened up, and the way we worked it, it did not. The pay was weaker on the south side than it was on the north side. We worked we pay out as far as we found it. As far as I know that was all

(Testimony of Andy Anderson.)

the pay there was on the south side of the claim. We worked it clear to the end of the pay. If we had had no other ground to work excepting that part of the south side, I don't think I would know how much it would cost to take the pay out. It depends on how long a man was locating the pay on it. If you had no other ground it might cost a little more. If we had had no other ground I think the reasonable expense would have been not to exceed 40%. The pay "petered out" on the south side of the claim. It pinched clear out. The pay on the south side was fifty feet wide at its widest point and narrowed down on each side—I wouldn't say exactly fifty feet, but about that; that is to say, it was the widest at a certain point and ran out at each end. It was in a kind of half-moon shape and right on the boundary line between the north and south half. This was not on the third beach line paystreak. It was not a beach formation. It was about three hundred feet south of the third beach line. The third beach line had been discovered at the time this ground was worked, but what was known as a "slough-over" paystreak had not been discovered or talked of to my knowledge in this community at that time. If there had been any such talk I think I would have known of it. I had a lease on the north half of the Metson Bench when I started to work out there. At that time there was no reason to believe that the third beach line would extend to the south half of the Metson Bench, and I was almost positive that it didn't even

(Testimony of Andy Anderson.)

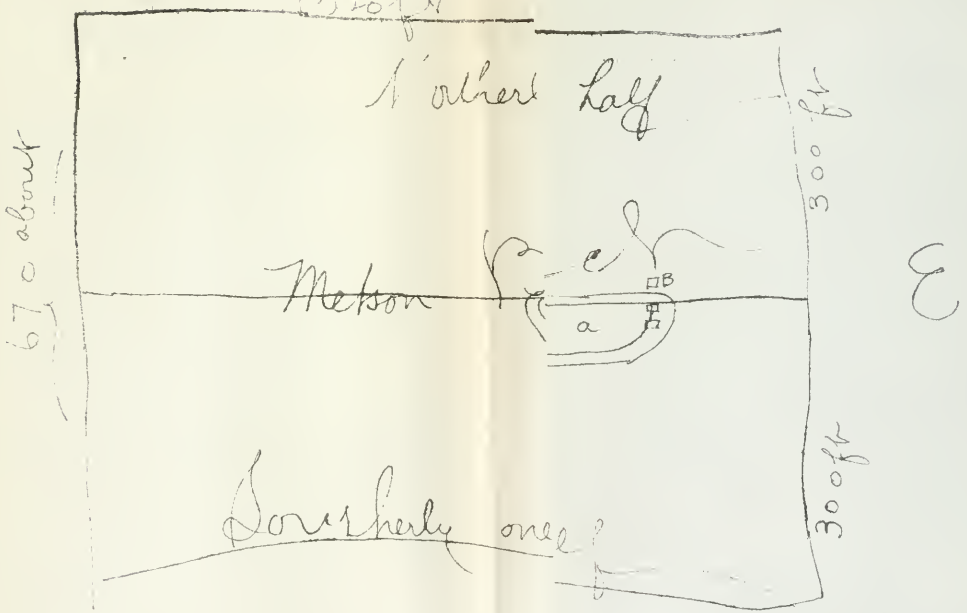
run into the north half, as I had been working on the Portland Bench, immediately to the north of us and had been down in their workings. At the time I took a lease on the Metson Bench there was no certainty that we would strike the pay. There was a little pay on further north of the line, adjoining the Metson Bench, that I knew about. I had a little pay next where I was working a lease from J. C. Brown up on No. 1; I worked pay there, and I was about through with my lease there—I had a little pay there, about four or five cent dirt, two or three feet or so, just a narrow streak, and to the north line, right at the north line of the Metson Bench, and that was the reason I took this lease, because I had this pay next to it. When I took hold of it, I thought it was a pretty good opportunity of finding something. I had the privilege of taking any part I wanted of the claim and I took the north half. At that time I could not have considered the south half at 40% a very good proposition. I couldn't say whether I would have gone into the south half at that time. I might have if I had nothing else to do. As to whether or not the south half would be speculative at that time, I would say that it is a kind of a speculation, no matter where you work in this country. It was uncertain, of course, just as all mining is. The south half was a good deal more uncertain than the north because I had found indications of small pay up there on the ground adjoining it on the north, about one hundred and fifty feet from the corner. I

(Testimony of Andy Anderson.)

had been in all the workings on the third beach and examined practically all of them. I was uncertain about where the pay went but it was my opinion that the third beach line did not go through the Metson and I know now that the third beach pay did not go through the Metson. Mr. Berger and I talked over about going into partnership when he started to sink a shaft. It was in November, I think, that we went into partnership, might have been in December. I offered to sell my lay on my half to Berger for $8,000.00 sometime in January. We didn't get into that piece of pay on the south part until the middle of March. The best indications were on the north side and as we went into the south the pay got poorer; it only went from three to six cents at its lower end. Mr. Berger and I were considering at one time of abandoning our workings on account of the pay we were getting in the first shaft we sunk on the Metson Bench. I don't know if we would have abandoned it; we might have investigated a little more.

At this point the witness Anderson draws a sketch of the Metson Bench. Said sketch was as follows:

[DEFENDANT'S "A"]
Sketch of N. "Manch"



(Testimony of Andy Anderson.)

At the request of counsel the witness marked, as accurately as he could, where the pay was on the southerly half of the claim. The place where the pay was taken out of the south side was marked with a double X, the witness stating that it was approximately fifty feet wide at the widest point and disappeared gradually on each side.

The witness continued to testify: The pay was more square on the easterly side, more crooked on the west side.

The foregoing pencil sketch was introduced in evidence, without objection, marked Exhibit "A."

The witness continuing, testified: The pay got less and less to the south until we could not take it out at a profit. As far as indications go that was the end of the pay, and we didn't feel justified in sinking any more shafts to find any more pay. We started prospecting on the 24th of October, after Mr. Kjelsberg went outside. Up to that time there had been no pay found on either side of this claim, except where I stated before, near the northwest corner on the line of the Brown Claim. I had worked up to that line when I had a lease on the Brown Claim. When I started to work on the Metson Bench I started to work where we could get into a little pay that I knew of. It didn't amount to much. We finally had to abandon it. It is too small pay to work. At that time there was nothing to indicate where the pay was on the south half, if any. At that time I could not state that there was any certainty what-

(Testimony of Andy Anderson.)

ever that there might be any pay on the south half of the claim. There was none that I knew of; a person might find it and he might not. It is a good place to look for it out in that neighborhood. I didn't consider the south half as good a place as the north half, but I suppose I would have looked for it there rather than in a good many other places.

The dirt that we took out averaged about five or six cents in both the north and south half. The best dirt was in the north half. The whole dump averaged between five and six cents. My estimate of $20,000, as being the amount that came out of the south half of this claim, is based entirely on my judgment in the matter I never did any figuring of the yardage in order to ascertain it: never had it surveyed. It is a kind of a rough estimate and not very accurate. We measured it with a tape-line once or twice underground.

Upon redirect examination the witness testified as follows: The sketch Defendant's Exhibit "A," being handed to the witness, the witness marks a point where Mr. Berger sunk his shaft first, with the letter "a." The second shaft he marked with the letter "b."

The witness then continued to testify: These two shafts were commenced about the same time—the latter part of October. Bedrock was fifty-three feet deep. We were occupied in sinking these two shafts about a month, as near as I can remember. We then discovered pay at the bottom of the shaft on the

(Testimony of Andy Anderson.)

north half of the Metson Bench. The shafts were from forty to sixty feet apart.

Mr. Berger and I talked it over and concluded that it would be cheaper to operate one camp than two and we went into partnership and continued the workings together. All the pay was taken out in that one space. It was about three hundred feet wide north and south.

Q. Now, Mr. Anderson, what ground lies immediately north of the Metson Bench?

Mr. ORTON.—Objected to as immaterial.

The COURT.—Objection overruled.

Exception taken by defendant.

A. The Railroad Claim, or No. 1 Below on Little Creek.

Q. Was that a valuable mining claim?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, not bearing upon the question of damages in this case, and not competent evidence tending to decrease or increase damages, or having any bearing whatsoever upon the question of damages in this case.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Yes.

Q. What other claim adjoins the Metson Bench on the north?

Mr. ORTON.—Same objection as being incompetent, irrelevant and immaterial, and having no bearing on the question of damages in this case, or tend-

(Testimony of Andy Anderson.)

ing to increase or decrease the amount of damages in this case, and not proper in any way.

The COURT.—Same ruling; overruled.

Exception taken by defendant.

A. Discovery Claim on Little Creek.

Q. State whether or not that is a valuable claim, or was a valuable mining claim?

Mr. ORTON.—That is also objected to as being incompetent, irrelevant and immaterial and not a competent question upon the question of damages in this case.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Yes.

Q. (By Mr. ORTON.) He is asking you about that time, is he?

The COURT.—Yes, you should fix a time—

Mr. ORTON.—I desire to add to all my other objections no time is fixed by the question.

The COURT.—Yes, fix the time.

Q. I am referring to the time between the date—prior to the date of this lease on the Metson Bench up until the spring of 1906?

Mr. ORTON.—I desire to add also in addition to the other objections to this question that whether it was or was not has nothing whatever to do with the value of this lease or the measure of damages in connection with this lease, as to what the conditions of other claims were in that vicinity whether they were or were not valuable, as affecting in any way the question of damages in this case.

(Testimony of Andy Anderson.)

The COURT.—Objection overruled; I presume the object is to show what Mr. Anderson knows of the subject in comparison with the value of this claim.

Exception taken by defendant.

Mr. COCHRAN.—That is just to help the jury in determining whether this was or was not a valuable lease.

Mr. ORTON.—I desire to add to my former objections that this is not a proper element of damage in this case, not proper to be considered by the jury in determining in any way, because there is not even a presumption that this is a country where one piece of ground is valuable and all the country adjacent to it is of the same value.

The COURT.—Objections overruled.

Exception taken by defendant.

A. I don't remember if any pay had been taken out of Discovery claim or not at that time when we started in—I don't remember about that now.

Q. Whereabouts is the Portland Bench with reference to the Metson Bench?

A. It is on the east—on the east and northeast.

Q. On the east and northeast? A. Yes, sir.

Q. About how would that appear upon that plat, Defendant's Exhibit "A"?

A. The Portland lies at the end here (indicating on Exhibit A) and runs up in that direction, further, towards the east—northeast.

Q. Generally?

A. Yes; I am not very familiar with the lines of the Portland Bench, myself.

(Testimony of Andy Anderson.)

Q. State whether or not there had been anything found on the Portland Bench Claim on Little Creek, at that time?

Mr. ORTON.—I desire to restate all the same objections, that it is irrelevant, incompetent and immaterial, not competent upon the question of damages in the case.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Yes.

Q. That is a valuable claim, also?

Mr. ORTON.—Same objection as to the last preceding questions upon all this line of testimony as follows: Objected to as being irrelevant, incompetent and immaterial, and incompetent evidence upon the question of damages in this case.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Yes; that was a good claim.

Q. About how much did it produce, if you know?

Mr. ORTON.—I don't think these questions should be asked, and I object to them being asked until at least the witness is shown to be qualified to testify upon the subject.

The COURT.—Objection overruled.

Exception taken by Defendant.

A. No, I don't know.

Q. Now, what other claims adjoin the Metson Bench on the south, if you know?

A. Why, there is an association claim called the Kiowa; it covers the Metson and a good many of

(Testimony of Andy Anderson.)

these claims which I have described; that is only one, the only one that I can think of just now.

Q. And the Portland Bench you say adjoins the Metson Bench on the east?

A. Yes. and northeast, too.

Q. Along the full end line?

A. I believe so; I am not so familiar with the lines of the Portland; I believe it does.

Q. And you considered that a good place, did you, to prospect for gold, Mr. Anderson?

Mr. ORTON.—Objected to as being irrelevant, incompetent and immaterial, and as having no bearing on the question of damages, and as not proper redirect examination. I didn't ask him this with regard to anything of this kind in my questions of cross-examination.

The COURT.—Overruled.

Exception taken by Defendant.

A. Yes.

Q. At the time you entered upon this lease for the north half of the Metson Bench, I mean?

A. Yes, sir.

Recross-examination.

Q. (By Mr. ORTON.) Now, is it not a fact, Andy, that there is just a little prong of the Portland Bench that comes up and adjoins this Metson Bench claim on the east, just a little irregular strip a few feet wide, on the east there—

A. I believe that is the way it is—as I say, I am not so very familiar with any of the lines of the Portland Bench.

(Testimony of Andy Anderson.)

Q. And there was none of the pay on that part of the Portland, was there?

A. I think not—it lies more to the other side there on the Portland.

Q. And the pay on the Portland is altogether not on that part of the claim?

A. It was further to the north, as I understand it— further on towards the north.

Q. This strip of the Portland that lies on the east of the Metson Bench is just a small triangular shaped piece, is it not?

A. Well, I would not quite remember how that line runs in there now—I am not very familiar with any of the other lines there, either, as I said before.

[Testimony of Joseph Chilberg, for Plaintiff.]

Mr. JOSEPH CHILBERG, a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

My name is Joseph Chilberg. I have been in Alaska most of the time since 1897. I am a brother of the plaintiff and am acquainted with Magnus Kjelsberg. I had a conversation with Magnus Kjelsberg in the fall of 1905. Mr. Magnus Kjelsberg called at my residence on two or three different occasions and at my place of business and requested me to use my influence with my brother to agree to turn over the business that he was engaged in; Mr. Kjelsberg wished me to use my influence with my brother, and at last on two occasions, in speaking about the matter, in urging me to use my influence with my brother he suggested, of course, what he

(Testimony of Joseph Chilberg.)

would do in consideration of the fact that my brother would turn the business over to him; he was very anxious, he said, to go out of the saloon business, so far as he himself was concerned, and he had then disposed of it, and in order to get out of it he was willing to make concessions to my brother, and among other things he was to surrender all the profits that had accrued in the business to my brother, and in addition to that he was to give him a lease on the Metson Bench. I did not understand anything about what portion of the Metson Bench, only that he would gladly give him a lease on the Metson Bench. He says, "I don't suppose he would care for that because he would not want to prospect it," but he says he was willing to give him a lease on the Metson Bench if he wanted it. And he came to where I was working one day, down on the beach, working down near the Standard Oil and he sent for him one day; one time when Mr. Anderson was there with me, I remember, and he wanted me to send for my brother —Mr. Anderson was there with me at that time, as I remember, and I left my place where I was working to go up town to talk to my brother about it, to see if I could bring about a sort of an arrangement about it between the two of them with reference to the matter, and I spoke to him at that time—I spoke to him a time or two, as I remember that Magnus would gladly give him a lease on the Metson Bench—Mr. Magnus on one or two occasions had spoken to me that he would be glad to give him a lease on the Metson Bench if he would agree to turn over the entire business to him—

(Testimony of Joseph Chilberg.)

Q. Was your brother present at any of these conversations? A. No.

Mr. ORTON.—Now, if your Honor please, I move to strike out the evidence of this witness as being irrelevant, incompetent and immaterial and not tending in any way to show that Mr. Kjelsberg made a contract with Mr. Chilberg, the plaintiff here. It seems he was discussing it with this witness, but there is nothing to show that any contract was ever entered into between plaintiff and defendant.

The COURT.—Motion overruled. We think it corroborates, to a certain extent, the plaintiff.

Exception taken by Defendant.

[Testimony of B. A. Chilberg, the Plaintiff (Recalled).]

B. A. CHILBERG, recalled as a witness in his own behalf, testified as follows:

I was acquainted with the mining ground known as the Metson Bench, the south half. I know where Berger and Anderson prospected in the fall of 1905, I knew where their dumps were on the south line. I intended to work on that ground under the lease that Mr. Kjelsberg had promised me. I intended to work the ground that fall and winter.

Q. Where did you intend to sink a shaft had you worked the ground, under your lease?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial and not a proper basis on which to estimate damages, as being too uncertain.

(Testimony of B. A. Chilberg.)

The COURT.—Objection overruled.

Exception taken by Defendant.

(Question read.)

A. I was going to go to about the middle line, anyway. I always had an idea that the pay was down in that direction on account of the Portland Bench being up on the one side Kiowa Bench on the other.

Q. State whether or not, Mr. Chilberg, you had made up your mind where you would sink a hole upon this ground, had Mr. Kjelsberg complied with his agreement in regard to giving you a lease on the south half of it?

Mr. ORTON.—Objected to as immaterial, because the witness has not yet shown that he had made up his mind to work at all.

The COURT.—Overruled.

Exception taken by defendant.

A. I had.

Q. Where did you intend to sink that hole with reference to the workings testified to by Mr. Anderson?

Mr. ORTON.—That is objected to as being irrelevant, incompetent, immaterial and as having no bearing upon the question of damages, particularly as the workings of Mr. Anderson were upon another part of the claim.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Well, I had thought—I had made up my mind to work on that on the south—or on the south half, rather, in the southeast corner—

(Testimony of B. A. Chilberg.)

Q. On the northeast corner of what part?

A. On the northeast corner of the south half of the Metson Bench, as near there as possible, on account of the pay there on the two sides. On account of the Portland Bench being on the one side and on account of Mr. Brown's pay on the other side, on the north.

Q. Mr. Chilberg, did you hear the testimony of Mr. Anderson? A. Yes.

Q. If there had been any *point* at the point where you intended to prospect this ground would you have discovered that pay if you had worked your lease?

Mr. ORTON.—Now, if the Court please, that is objected to as incompetent, irrelevant and as calling for a conclusion of the witness.

Mr. PACKWOOD.—I desire to hand this Exhibit to the witness, if the Court please.

Mr. ORTON.—No, your Honor, I object to this exhibit being shown to the witness, if the Court please, for him to testify that he would have sunk a shaft in exactly the same place where it is shown upon this plat that Anderson & Berger sunk their shafts in which they discovered the pay. We think he should testify first to the point where he intended to sink his shaft, if at all, without his being permitted to take this exhibit, and pick out the identical spot from it, where by the workings of these other men the pay was located.

Mr. PACKWOOD.—I think we are entitled to hand this plat to the witness for the purpose of getting his testimony clearly before the jury—

(Testimony of B. A. Chilberg.)

The COURT.—We permit the exhibit to be shown to the witness.

Mr. ORTON.—We save an exception, if your Honor please, to the Court's ruling that it may be shown to the witness over the objections of the defendant, as highly prejudicial to the rights of the defendant.

Exception taken by defendant.

(Question read.)

A. Well, I think I would, yes.

Q. After you discovered the pay could you have taken it out? A. I certainly could.

Mr. ORTON.—That is objected to as being incompetent, irrelevant and immaterial and calling for the conclusion of the witness and further because it has not been shown in the evidence in his testimony that there was any pay where he said he was intending to prospect.

The COURT.—Objection overruled.

Exception taken by defendant.

Q. And would you have done so?

Mr. ORTON.—We make the same objections, that it is incompetent, irrelevant and immaterial, and is not a proper measure of damages, and as not being the measure of damages as alleged in the complaint.

The COURT.—Objection overruled.

Exception taken by defendant.

A. I certainly would

(Witness handed Defendant's Exhibit "A.")

Mr. ORTON.—I desire to object to the witness being shown this exhibit in order that he may testify

(Testimony of B. A. Chilberg.)

that he would have sunk a shaft in identically the same place that Mr. Anderson marked out upon this plat.

The COURT.—Well, I don't know what the question is yet.

Mr. ORTON.—We object to counsel taking this exhibit and showing it to the witness upon the stand and then permitting him to testify from that as being made by Mr. Anderson, after hearing Mr. Anderson testify in regard to the position of these shafts.

The COURT.—We can't deprive him of that right if it is shown him in connection with a proper question.

Exception taken by defendant.

Mr. PACKWOOD.—Witness is handed Defendant's Exhibit "A" and asked:

Q. State if there had been any pay within the boundaries marked on that paper as having been worked out between the double lines there on with the letter x x x, if you had been permitted to work your lease, if you would have discovered that pay?

Mr. ORTON.—That is objected to as calling for the conclusion of the witness, asking merely and solely for a prophecy upon his part, as to what he would have done, and as being a question which it is impossible for any one to answer.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Well, as I stated before, it was my intention to work that portion of the claim, and I don't see how I could miss the paystreak there.

(Testimony of B. A. Chilberg.)

Mr. ORTON.—Now, I move to strike that out as not responsive to the question.

The COURT.—Motion overruled.

Exception taken by defendant.

Q. Now, Mr. Chilberg, you may state whether or not if Mr. Anderson or any one else had sunk a shaft or hole, during the winter of 1905—or during the months of October, November or December, 1905, at that point marked "b" there, and had discovered pay there in that hole, that if from that circumstance and that fact, you would have been able to locate the pay on the south half of the Metson Bench?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial and calling for the conclusion of the witness, also as incompetent, the reason that one person had discovered pay on one end of a claim, or on an adjoining claim, across the line and at a considerable distance from it, and also a hole having been sunk after the time of the alleged breach was committed, on the self same ground, namely by the lessee, Mr. Berger of the self same ground, is certainly wholly incompetent, irrelevant and immaterial, and not proper in this case, and as calling for a conclusion, wholly, from the witness.

The COURT.—Objection overruled.

Exception taken by defendant.

A. Well, it would certainly be very easy then to find the paystreak, under those circumstances, if I knew them, certainly.

Q. Would you have found the paystreak under that state of facts?

(Testimony of B. A. Chilberg.)

Mr. ORTON.—Same objections.

The COURT.—Objection overruled.

Exception taken by defendant.

Mr. ORTON.—It simply calls for the conclusion of the witness. That might be proper for the jury to determine from all the evidence submitted to them.

The COURT.—Well, he has testified to matter within his own consciousness—I don't see how he can be deprived of testifying to his opinion upon that subject.

Mr. ORTON.—The further objection to this question is, that these shafts referred to were sunk at a time on the premises adjoining after the time when the alleged breach of this contract of a mining lease was committed upon the selfsame ground, by the same Mr. Berger who held the lease for the same ground for the same period.

The COURT.—Objection overruled.

Exception taken by defendant.

Q. Under the state of facts, that a shaft had been sunk right here at the point marked "b" on this Exhibit, and pay found, would you then have found the paystreak, had you been permitted to work this ground under your lease?

A. Well, yes, I think I would.

Q. Well, I will just adopt the Court's question: If you had followed out the plan which you already have stated in regard to mining the Metson Bench under the lease which had been promised you by Mr. Kjelsberg, would you have discovered pay?

(Testimony of B. A. Chilberg.)

Mr. ORTON.—Same objections, that the question is too speculative and uncertain, and is incompetent, irrelevant and immaterial, and as calling for a conclusion of the witness.

The COURT.—Objection overruled.

Exception taken by defendant.

A. This is the xx here? Referring to Ex. "A." This is on the south half of the claim, is it?

Q. Well, I say would you have discovered pay there under those circumstances?

Mr. ORTON.—I make all the same objections as to the last two preceding questions.

The COURT.—Overruled.

Exception taken by defendant.

A. I think I would; I don't see how I could have missed it.

The witness further testified: I have been mining since 1900; done considerable work in sinking shafts in frozen ground; done work in the vicinity of this Metson Bench. I heard the testimony of Mr. Anderson in regard to the dimensions of this piece of ground worked out in the south half of the Metson Bench.

Q. If you found the pay upon the ground, Mr. Chilberg, how did you contemplate working upon the ground?

Mr. ORTON.—Objected to for all the reasons before stated, together with the further objection that it is too speculative, being based upon something which is too speculative, that is, the question of whether or not he found the pay.

(Testimony of B. A. Chilberg.)

The COURT.—Objection overruled.

Exception taken by defendant.

A. Well, it depended on the pay that I found how I would work it. I would probably use a windlass to prospect, until I found pay, and then put up a hoist, undoubtedly; that was my intention.

Upon cross-examination, the witness testified as follows:

I intended to work this claim near Brown's claim, on that part of it. I expected to prospect on different parts of the claim.

[Testimony of Eugene Chilberg, for Plaintiff.]

EUGENE CHILBERG, sworn and testified as follows:

I reside in Nome, occupation, mining. I am acquainted with the plaintiff, the defendant Magnus Kjelsberg, and the Metson Bench.

Q. (By Mr. PACKWOOD.) You may state whether or not in the fall of 1905, in September, or about the time Mr. Kjelsberg left Nome for the outside he left any instructions with you to give a lease to Mr. B. A. Kjelsberg, the plaintiff, on the Metson Bench.

Mr. ORTON.—Objected to as being incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Exception taken by the defendant.

A. Yes. That authority was in writing; I gave it to Mr. Kjelsberg at his request when he came in at the opening of navigation in 1906. Magnus

(Testimony of Eugene Chilberg.)

Kjelsberg is without the District of Alaska at the present time.

Q. Now, you may state what the contents of the letter was.

Mr. ORTON.—That is objected to, if the Court please, as being irrelevant, incompetent and immaterial, and as calling for secondary evidence.

The COURT.—Objection overruled.

Exception taken by the defendant.

A. He stated in the letter that he wished me to give a lease to Jacob Berger. I received that letter from Mr. Gordon some time in September, 1905. The purport of the letter was with regard to this matter of the lease to Berger of the south half of the Metson Bench. I cannot recollect any other of the contents of the letter. I cannot recollect whether he mentioned any particular part of the Metson Bench. I presumed that he referred to the south half. I acted under that letter and executed a lease to Berger on the south half of the Metson Bench, in November or December, I am not sure which, 1905. Mr. Chilberg spoke to me immediately after the boats went out in regard to a lease. I never received any instructions from Mr. Kjelsberg to execute a lease to him. Mr. Berger accepted the lease and went to work under it.

Q. How long did he work under that lease?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Exception taken by defendant.

(Testimony of Eugene Chilberg.)

A. Continuously, until June, 1906. Mr. Kjelsberg received the royalty from Mr. Berger and accepted it.

Cross-examination.

I was interested in the lease that Mr. Anderson had; we were partners; I knew that when I let this lease that I would be interested in it by virtue of my partnership with Andy Anderson. Mr. Kjelsberg afterwards brought suit against me about that. Margraff was working on the north half in the spring of 1905. The letter that Magnus left for me read about this way: "It looks as if Margraff didn't want the lease, and if he does not want it you can give it to Berger." Margraff was through working out there and he had decided that he didn't want the lease.

Q. It didn't look good enough to him?

Mr. PACKWOOD.—That is not proper cross-examination, and is wholly irrelevant, incompetent and immaterial for any purpose.

The COURT.—Objection sustained.

Exception taken by defendant.

I think Mr. Berger went to work out there in November; he went to work before he got the lease; I would not execute it for a long time, because I knew that Magnus had promised B. A. Chilberg a lease, but after he went out I received that letter informing me to give a lease to Mr. Berger, and I didn't know exactly what to do in the matter; I thought possibly that he might want to change his mind about the south half in some way, and so I wrote out to

(Testimony of Eugene Chilberg.)

Magnus and told him that I wanted to know what he wanted me to do in respect to giving a lease to B. A. Chilberg. I wrote out so late it was impossible to get a reply from Mr. Kjelsberg before navigation closed; and the overland mail had not yet come in when I executed this lease. I think Berger and Anderson went into partnership about December, 1905; they had agreed to go into partnership before I executed the lease to Berger. Margraff and Rief would not take it, and therefore I gave it to Berger. I can't say just how many times B. A. Chilberg spoke to me about this matter after Mr. Kjelsberg left for the outside, but I recollect that he spoke to me; but he never offered to go to work out there on the ground. He didn't attempt to go to work at all. The plaintiff is my uncle.

Redirect Examination.

I wrote to Mr. Kjelsberg in regard to this lease on one of the last boats.

Q. The telegraph wires were in operation all winter, most of the time, were they not, and all fall, were they not?

Mr. ORTON.—That is objected to as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Exception taken by defendant.

A. I presume they were. There were interruptions as I remember a great deal that fall. I presume Mr. Kjelsberg could have telegraphed me in regard to the matter. I do not know why Mr. Chilberg did not go to work or attempt to go to work.

[Testimony of B. A. Chilberg, the Plaintiff (Recalled).]

B. A. CHILBERG, recalled in chief, testified as follows:

Q. (By Mr. PACKWOOD.) Mr. Chilberg you may state whether or not you were able during the fall of 1905 and the following winter and spring of 1906 to work and mine the property in question in this case.

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, and not competent evidence upon the question of damages.

The COURT.—Objection overruled.

Exception taken by the defendant.

A. I was not.

Q. Did you intend to mine the same in the ordinary manner of mining in this district?

Mr. ORTON.—That is objected as being incompetent, irrelevant and immaterial and too speculative.

The COURT.—Objection overruled.

Exception taken by defendant.

Q. Mr. Chilberg, you testified yesterday upon cross-examination that you had an oral lease. Have you any explanation of that at the present time?

Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, and does not require any explanations, and calls for a conclusion of the witness.

The COURT.—Objection overruled.

Exception taken by defendant.

(Testimony of B. A. Chilberg.)

A. Well, when I spoke to Mr. Orton, Mr. Orton brought me out on the question about an oral lease, I had reference to an oral agreement to give a lease; I never considered that I had a lease; that a lease had been given to me; that is the way I took it, was that Mr. Kjelsberg—by my words, would give me a lease.

Mr. ORTON.—I move to strike the answer out as not an explanation but a direct contradiction of what he said yesterday, and incompetent, irrelevant and immaterial.

The COURT.—Motion overruled.

Exception taken by defendant.

Cross-examination.

I testified yesterday that I didn't sink a hole at the northeast corner, because there was a hole already sunk there. I didn't know how deep the hole was sunk nor who sunk the hole. I don't know that the hole was sunk by Mr. Gordon for assessment work and that it was only twenty feet deep, and that the bed rock was some fifty-four feet deep on this claim. The hole was sloughed in and I could not tell how deep it was. I could not tell whether it had ever been fifty-four feet deep. I had not been to the hole. I had not been upon that claim at all. I intended to prospect at various parts of that claim to find the pay, and if I didn't find it in one place then to continue and prospect in other places, until I either found pay to work or satisfied myself that there was no pay on it. I never went over to the

(Testimony of Jacob Berger.)

hole sunk by Andy Anderson on the northern portion of this claim.

Plaintiff rests.

[Testimony of Jacob Berger, for Defendant.]

JACOB BERGER, sworn and testified as follows:

I am the J. Berger who had a lease on the south part of the Metson Bench. I am a miner by occupation. I have followed that occupation since 1900. I have mined extensively in the Nome District for several years. I am well acquainted with the Metson Bench, and commenced work on it under my lease from Mr. Kjelsberg the latter part of October, 1905. There had not been any pay discovered on the claim at that time. There had been a shaft sunk on the northerly portion of the south half, the northeast corner of the south half of the Metson Bench claim, about eighteen or twenty feet deep, but not to bedrock. Bedrock on the Metson Bench is all the way from fifty to fifty-five feet deep. The pay lies mostly on the bedrock. At the time I went to work under my lease there was no pay discovered upon the north end of the southerly portion—the south half of the Metson Bench. I discovered the pay on the south half after I went to work under my lease. The terms of my lease were forty per cent to Kjelsberg and sixty per cent to me. I am familiar with the ground in that vicinity, and the work that has been carried on in that vicinity. I have operated claims under lease in this country under that character of ground, and am familiar with leases of that character of ground.

(Testimony of Jacob Berger.)

Q. Now, Mr. Berger, at the time you obtained your lease and went to work out there under it, state whether or not a lease, being a lease of forty per cent to the owner and sixty per cent to yourself, was of any substantial value?

Mr. COCHRAN.—That is objected to as being irrelevant, incompetent and immaterial, and not a proper measure of damage in this case.

The COURT.—Objection sustained.

Exception taken by defendant.

Q. Mr. Berger, I will ask you to state whether or not a lease under terms such as you had stated that you had, that is, forty per cent to the owner and sixty per cent to the lessee, on ground such as the Metson Bench, on which pay had not yet been discovered, was of any value other than a speculative value.

Mr. COCHRAN.—Objected to as being irrelevant, incompetent and immaterial for any purpose, and not a proper measure of damage in this case.

The COURT.—Ojection sustained.

Exception taken by defendant.

Q. Mr. Berger, I will ask you if you can state whether or not a lease of the character which you had at that time, of the terms of which I have just enumerated, was at that time of any value?

Mr. COCHRAN.—That is objected to, if the Court please on the grounds that it is wholly irrelevant, incompetent and immaterial for any purpose, and not a proper measure of damage in this case.

The COURT.—Objection sustained.

Exception taken by defendant.

(Testimony of Jacob Berger.)

I took a block of low grade pay-dirt somewhere around three hundred feet in length by about sixty-five to seventy feet wide at the widest point, out of the Metson Bench under my lease in the fall and winter of 1906. It was a sort of a half-moon shaped piece, tapered down to nothing on each side as it approached the ends as Mr. Anderson testified. I was on the ground myself while I was operating it, and panned the ground daily; the pay was mostly lying on bedrock; in places it would get about a foot or a foot and a half above, and then just a few inches. Some days it panned five or six cents; and some days it didn't go over three cents, along the pay. I would estimate roughly that the amount of gold taken out of that part of the ground was between fifteen and twenty thousand dollars. I am familiar with the expenses of taking it out. After paying the royalty the profit did not amount to over five per cent. After taking out this block of pay I found no further pay. It ran out on the southerly half of the claim; it was of such low grade that it would not pay to hoist. I continued to try to find pay in other parts of the claim, and ran some drifts and sunk shafts, we sunk a shaft in the northeast corner about a hundred and fifty feet east from this shaft that was there eighteen or twenty feet deep, that I spoke of in the first part of my testimony, over close to the Portland Bench, about a hundred feet, maybe a hundred and fifty feet from the Portland Bench. I sank that shaft to bedrock; found no pay, and drifted some hundred and odd feet, and found no pay. I prospected on other parts of the

(Testimony of Jacob Berger.)

claim. I put down two drill holes. In the west part of the south half of the claim I put down another shaft, and ran drifts from it, but found no pay. I spent between seven and nine hundred dollars in prospecting the southerly portion of this claim where I didn't find any pay at all. If I had had only a lease upon the southerly half of this claim, and had operated the southerly portion of it and found the block of pay which I took out, and worked in an economical manner, I would have made just about a "stand-off." I might have made a very small profit and there might have been a very small loss. The Portland Bench lies immediately easterly of the Metson Bench. There was not any pay found that I know of in that part of the Portland Bench or any taken out there of the Portland Bench immediately to the east of the south half of the Metson Bench. If there has been any I would have known it. I have been on the Portland Bench and the pay there did not lie adjacent to the Metson Bench.

Cross-examination.

I try to be an economical miner. I am just as good a miner as Andy Anderson. The best piece of ground that I took out was about three hundred feet in length and in the form of a half-moon, and sixty-five feet wide at its widest point and mining it in an economical manner, and it cost to take it out forty to fifty per cent.

Redirect Examination.

This forty to fifty per cent which it cost to take the pay out included the expenses of prospecting that had been done up to that time.

(Testimony of Jacob Berger.)

Recross-examination.

Every dollar that came out of the ground, of that part of the ground, it cost forty to fifty per cent of it to operate that operation of the ground; that would include machinery, sinking of shafts and different prospecting and previous and subsequent prospecting. I estimate that it would cost me eight thousand dollars to take this piece of pay out of the ground on the basis of the size of the pay ground that was contained in the south half of this claim; it might be a little under or might be a little over eight thousand dollars. There was about a foot and a half of pay at its extreme depth, from that down to a few inches, and at some places there was very little. The extreme length was about three hundred feet by about sixty-five feet at its extreme width; I did not hoist all of it, the poorest of it I threw back into the stopes. It was frozen ground. I don't remember how long it took us to take it out; we worked most of the winter. I had twelve to fifteen men employed on the Metson Bench, in running drifts. I don't remember how long it took to take out this block of ground.

The foregoing is the substance of all the evidence introduced at the trial of the above-entitled action.

Be it further remembered, that the defendant, before the Court charged the jury, requested, in writing, the following instruction:

[Instructions to the Jury Requested by the Defendant and Refused.]

1.

"The jury are directed to find a verdict for the Defendant,"—which instruction was refused by the

Court, and the defendant then and there duly excepted.

Thereupon, the defendant requested, in writing, the following instructions:

1-A.

"Under the evidence in this case no more than nominal damages can be allowed in any event,"—which instruction was refused by the Court and the defendant then and there duly excepted.

1-B.

"In assessing the damages, in case you should decide in plaintiff's favor, you are instructed that the measure of plaintiff's damage is the value of the lease claimed by him at the time when the defendant breached the contract,"—which instruction was refused by the Court, and the defendant then and there duly excepted.

2.

"You are also instructed that in estimating these damages you should not take into consideration any uncertain or contingent profits which the plaintiff might or might not make from the working of the premises," which instruction was refused by the Court, and the defendant then and there duly excepted.

Whereupon, the Court instructed the jury as follows:

[Instructions of the Court to the Jury.]

In the District Court for the District of Alaska, Second Division.

B. A. CHILBERG

vs.

MAGNUS KJELSBERG.

Gentlemen of the Jury:

The action you are now to decide has been brought to recover damages for breach of an oral contract made and entered into on September 1st, 1905, by and between the plaintiff and defendant.

The amount of damages claimed by the plaintiff is Fifty Thousand Dollars, the amount which he alleges he would have realized from the contract had it been carried out and fulfilled by the defendant, according to its terms.

The plaintiff alleged that on September 1st, 1905, and for a time prior thereto the parties to this suit were copartners in the conduct of the Discovery Saloon in Nome, and the copartnership is not denied by the defendant.

The plaintiff further alleges that the defendant, Magnus Kjelsberg, being desirous of terminating the copartnership on September 1st, 1905, at which time there was stock on hand and other stock ordered but not paid for, promised and agreed that in consideration of plaintiff's conveying and delivering to M. Gordon at his, Kjelsberg's request, the plaintiff's interest in the business, namely, the undivided one-half

interest therein, as also his half of the stock of liquors on hand, and in further consideration of his transferring to Gordon the unexpired liquor and cigar licenses held by him, Chilberg, in his name, he, Kjelsberg would allow and give to the plaintiff the whole of the net profits earned in the said saloon business up to Sept. 1, 1905, would take over and pay for all stock ordered and not received by the plaintiff for use in the business including one phonograph, and furthermore would give and execute to the plaintiff a lease upon the south one-half of that certain mining claim known as the Metson Bench placer claim situate near Little Creek, in the Cape Nome Recording District, Alaska, to run for the following winter mining season of 1905 and the spring mining season of 1906, and to expire on the first day of June, 1906, the royalty to be reserved by the defendant and to be paid by the plaintiff, being 40% of all gold and other precious metals extracted from said claim during the term of said lease.

The plaintiff further alleges performance on or about September 1st, 1905, of each and all of the conditions and terms of said oral contract which on his, the plaintiff's part were to be kept and performed, but that defendant failed and refused to perform the conditions of said contract on his part, in this: That he not only failed and refused to make, execute and deliver to plaintiff the lease which he had agreed to execute and deliver to him as above set forth, but that he made, executed and delivered to one J. Berger a lay or lease of said ground, and plaintiff was thereby prevented from working said ground.

The plaintiff, lastly, alleged that the lay or lease agreed to be given by the defendant as I have herein above set forth was worth to him, the plaintiff, fifty thousand dollars, and he could and would have extracted from the ground proposed to be let to him, over and above the royalty stipulated to be paid to the defendant, added to the necessary expenses of working, mining and operating said ground, gold and gold-dust to the value of fifty thousand dollars, and that, by reason of the failure of defendant so to execute and deliver to the plaintiff the lay agreed upon, plaintiff is damaged in the sum of fifty thousand dollars, which amount he sues to recover.

The defendant answers the complaint saying that he on or about September 1st, 1905, paid to the plaintiff One Thousand Dollars, a sum which exceeded the value of plaintiff's one-half interest in the stock of liquors, etc., on hand belonging to the firm, allowed the plaintiff all the net profits theretofore earned by the copartnership, and agreed to pay for all stock ordered for the firm but at that time not yet received, and thereafter did pay for said ordered stock.

He, however, flatly denies that he ever agreed to give and execute to the plaintiff any lease on said Metson Bench whatsoever.

The plaintiff in turn, by way of reply to the new allegations of fact made by defendant in his answer, generally denies each and every of said allegations.

These pleadings raise the issues or questions which are now to be submitted to you for your decision.

Of these questions the two principal ones are:

1. Was it an element in the contract to dissolve the copartnership that the defendant Kjelsberg was to give to the plaintiff Chilberg, a lease of the southern half of the Metson Bench placer claim, with provisions therein that the defendant was to receive a royalty of forty per cent, of the gold to be extracted from the ground and that the term of the lease was to run from on or about Sept. 1, 1905, to the close of the sluicing season in June, 1906?

2. Does the evidence establish the proposition that the plaintiff has been damaged in the sum of $50,000.00 or any lesser sum?

If you find from the preponderance of the evidence that the defendant agreed with the plaintiff to make and execute to him a lease for the southern half of the Metson Bench placer claim, and then failed to make a lease to him and furthermore made a lease covering the same ground to another then there was a breach of the oral agreement at the dissolution of the copartnership and the plaintiff would be entitled to at least nominal damages as indemnity for the breach or violation of said oral contract.

And I instruct you that by nominal damages is meant a small sum of money, as for example, seventy-five cents or one dollar.

The Court instructs the jury as follows:

That the rule of law is, that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement to lease, he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain. So far as money can do

it the the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased. Proof of the profits may be made by showing what profits were made under a like lease by other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in the same manner as the persons who had worked the same.

The Court instructs the jury that if you find from the evidence that pay dirt and gravel has been mined from said premises agreed to be leased to the plaintiff (if you find such an agreement existed), by other lessees of the defendant during the period of time for which plaintiff was to have a lease thereon; and you further find with probable certainty that the plaintiff, if he had been permitted to work said lease agreed upon would have discovered said pay dirt and gravel, and would have worked and mined the same at a profit, you will find for the plaintiff, and in that case his measure of damages is that profit, if any, which would have been derived during the term of the lease agreed upon between the defendant and the plaintiff, if any such agreement existed, after first deducting the royalty agreed upon and reasonable costs of mining and extracting the values from said pay-dirt and gravel.

And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form somewhat more concrete, that if they find from the evidence that the defendant during the fall of 1905 entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another covering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profit which you shall find from the evidence, he would have made if the lease agreed upon had been fully performed by him.

You are instructed in this case to find for the plaintiff for some amount; that amount to be filled in in the form of verdict which I send out with you to your jury-room.

The jury are instructed that you are the judges of the effect and value of the evidence addressed to you. You are however instructed:

1. That your power of judging the effect of the evidence is not arbitrary, but is to be exercised with

legal discretion and in subordination to the rules of evidence.

2. You are not bound in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds.

3. That a witness wilfully false in one part of his testimony may be distrusted in others.

4. In civil cases the affirmative of the issue shall be proved by the party alleging it, and when the evidence is contradictory your finding shall be in accordance with the preponderance of the evidence. You are instructed that the preponderance of the evidence is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining on which side is the preponderance of evidence you should take into consideration the opportunity of the several witnesses for seeing and knowing the things to which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial, and from all these circumstances determine on which side is the weight and preponderance of the evidence.

You will take with you to your jury-room one form of verdict drawn in conformity with the law. When you have retired and have agreed upon your verdict you should sign by the hand of your foreman, selected by yourselves, said form, after inserting the

amount of damages therein which you may find, after you shall unanimously agree upon the amount, and return same into Court as your verdict in this case.

In conformity with the law of Alaska you will be allowed to take with you into the jury-room the pleadings setting forth the facts in the case as each party claims them to be, and the exhibits in the case.

Let the bailiffs be sworn. You may now retire, gentlemen, to deliberate upon your verdict.

Dated Nome, Alaska, April 8, 1908.

ALFRED S. MOORE,
District Judge.

[Endorsed]: Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Apr. 9, 1908. Jno. H. Dunn, Clerk. By ————, Deputy.

[Defendant's Exceptions to the Instructions of the Court to the Jury—Given and Refused.]

Whereupon, before the jury retired to consider of their verdict, the defendant took the following exceptions:

First Exception.

Defendant excepts to the following instruction given by the Court to the jury:

"That the rule of law is, that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement to lease, he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain."

Second Exception.

Defendant excepts to the following instruction given by the Court to the jury:

"So far as money can do it, the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased."

Third Exception:

Defendant excepts to the following instruction given by the Court to the jury:

"Proof of the profits may be made by showing what profits were made under a like lease by other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in the same manner as the persons who had worked the same."

Fourth Exception.

Defendant excepts to the following instruction given by the Court to the jury:

"The Court instructs the jury that if you find from the evidence that pay-dirt and gravel has been mined from said premises agreed to be leased to the plaintiff (if you find such an agreement existed) by other lessees of the defendant during the period of time for which plaintiff was to have a lease thereon; and you further find with probable certainty that the plaintiff, if he had been permitted to work said lease agreed upon would have discovered said pay-dirt and

gravel, and would have worked and mined the same at a profit, you will find for the plaintiff, and in that case his measure of damages is that profit, if any, which would have been derived during the term of the lease agreed upon between the defendant and the plaintiff, if any such agreement existed, after first deducting the royalty agreed upon and reasonable costs of mining and extracting the values from said pay-dirt and gravel."

Fifth Exception.

Defendant excepts to the following instruction given by the Court to the jury:

"And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form somewhat concrete, that if they find from the evidence that the defendant during the fall of 1905, entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, District of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another covering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profit which

you shall find from the evidence, he would have made if the lease agreed upon had been fully performed by him."

Sixth Exception.

Defendant excepts to the following instruction given by the Court to the jury:

"You are instructed in this case to find for the plaintiff for some amount."

Seventh Exception.

The Court erred in refusing to give to the jury the following instruction numbered 1:

"The jury are directed to find a verdict for the defendant."

Eighth Exception.

The Court erred in refusing to give the following instruction to the jury, requested by the defendant, numbered 1-A:

"Under the evidence in this case no more than nominal damages can be allowed in any event."

Ninth Exception.

The Court erred in refusing to give the following instruction to the jury, requested by the defendant, numbered 1-B:

"In assessing the damages, in case you should decide in plaintiff's favor, you are instructed that the measure of plaintiff's damage is the value of the lease claimed by him at the time when defendant breached the contract."

Tenth Exception.

The Court erred in refusing to give the following instruction to the jury, requested by the defendant, numbered II:

"You are also instructed that in estimating these damages you should not take into consideration any uncertain or contingent profits which the plaintiff might or might not make from the working of the premises."

Thereupon, the jury retired to consider of its verdict and afterwards returned into court with a verdict in favor of the plaintiff, assessing his damage in the sum of Two Thousand Dollars.

Now, therefore, in order to make the foregoing matters of record, the defendant presents this, his Bill of Exceptions, and prays that the same may be settled and allowed.

IRA D. ORTON,
Attorney for Defendant.

[Order Settling, etc., Bill of Exceptions.]

Now, to wit, Feb. 13, 1909, the foregoing bill of exceptions having been presented to the Court, the said bill is settled and allowed.

ALFRED S. MOORE,
Dist. Judge.

United States of America.
District of Alaska,—ss.

Due service of the within Bill of Exceptions is hereby accepted at Nome, Alaska, this 11th day of Jan. 1908, by receiving a copy thereof.

O. D. COCHRAN and
W. H. PACKWOOD,
Attorneys for Plaintiff.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chil-

berg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Bill of Exceptions. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 11, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. Ira D. Orton, Attorney for Deft. McB. Refiled in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 13, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. McB.

In the United States District Court, District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled action and assigns the following errors as having been committed on the trial of the above-entitled action, and excepted to by him, upon which said defendant, Magnus Kjelsberg, does and will rely upon his Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit:

1.

The Court erred in instructing the jury as follows:

"That the rule of law is, that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement

to lease, he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain."

2.

The Court erred in instructing the jury as follows:

"So far as money can do it the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased."

3.

The Court erred in instructing the jury as follows:

"Proof of the profits may be made by showing what profits were made under a like lease by other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in the same manner as the persons who had worked the same."

4.

The Court erred in instructing the jury as follows:

"The Court instructs the jury that if you find from the evidence that pay dirt and gravel has been mined from said premises agreed to be leased to the plaintiff (if you find such an agreement existed), by other lessees of the defendant during the period of time for which plaintiff was to have a lease thereon; and you further find with probable certainty that the plaintiff, if he had been permitted to work said lease agreed upon would have discovered said pay-dirt and

gravel, and would have worked and mined the same at a profit, you will find for the plaintiff, and in that case his measure of damages is that profit, if any, which would have been derived during the term of the lease agreed upon between the defendant and plaintiff, if any such an agreement existed, after first deducting the royalty agreed upon and reasonable costs of mining and extracting the values from said pay-dirt and gravel."

5.

The Court erred in instructing the jury as follows:

"And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form somewhat more concrete, that if they find from the evidence that the defendant during the fall of 1905 entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, District of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another covering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profits which you shall

find from the evidence, he would have made if the lease agreed upon had been fully performed by him."

6.

The Court erred in instructing the jury as follows:

"You are instructed in this case to find for the plaintiff for some amount."

7.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 1:

"The jury are directed to find a verdict for defendant."

8.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 1-A:

"Under the evidence in this case no more than nominal damages can be allowed in any event."

9.

The Court erred in refusing to give the following instructions requested by the defendant, in writing, numbered 1-B:

"In assessing the damages, in case you should decide in plaintiff's favor, you are instructed that the measure of plaintiff's damage is the value of the lease claimed by him at the time when the defendant breached the contract."

10.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 2:

"You are also instructed that in estimating these damages you should not take into consideration any uncertain or contingent profits which the plaintiff might or might not make from the working of the premises."

11.

The Court erred in overruling the objection of the defendant to the question propounded to the plaintiff when testifying in his own behalf, which question was propounded after plaintiff had testified that he intended to work the south half of the claim known as the Metson Bench under the lease Mr. Kjelsberg had promised him, and which question was as follows:

"Q. How did you intend to work it." The objection and ruling of the Court being as follows:

"Mr. ORTON.—That is objected to as entirely immaterial what the intentions on his part were, and improper upon the question of damages, and it being certainly an attempt to get incompetent questions upon the question of damages in this case.

"The COURT.—He must show that he intended to work the claim; objection overruled.

"Answer. I was going to put down a shaft, and if I found pay then I was going to put in a hoist and work it just the same as any other claim."

12.

The Court erred in overruling the objection of the defendant to the next question propounded to the plaintiff, the question, objection, ruling of the court and answer being as follows:

"Q. Do you know where Mr. Berger sunk his shaft afterwards?

"Mr. ORTON.—Objected to as incompetent, irrelevant, and immaterial and as having no bearing whatever upon the question of damages.

"The COURT.—Overruled.

"A. Yes, sir."

13.

The Court erred in overruling the objection of the defendant to the next question propounded to plaintiff, the question, objection, ruling of the court and answer being as follows:

"Q. How, far, about, was his shaft from the line? That is, about how far from the line dividing the claim in the middle?

"Mr. ORTON.—Objected to as immaterial.

"The COURT.—Objection overruled.

"A. I don't know exactly how far from the line it was; I could not tell you just how far it was; all I could say is that he sunk his shaft upon the piece of ground that I was to have a lay on."

14.

The Court erred, after the witness Andy Anderson had testified that he was mining on the Metson Bench and was acquainted with the Southerly portion of the Metson Bench and had formerly worked thereon, in overruling the objection to the question propounded to him, the question, objection, ruling of the court and answer being as follows:

"Q. Under what circumstances?

"Mr. ORTON.—That is objected to as being irrelevant, incompetent, and immaterial and not a proper element of damages in any way.

"Mr. COCHRAN.—We want to show what they took out of the ground in dispute.

"Mr. ORTON.—Objected to as irrelevant, incompetent and immaterial and too speculative and remote for a proper basis of damages.

"The COURT.—During the term of Mr. Chilberg's lease, upon the very section of the ground covered by this lease, part of the identical portion of the Metson Bench? I think it is proper.

"Mr. COCHRAN.—Yes, your Honor. We propose to show what was taken out of the identical portion of the Metson Bench during the very same time for which the lease was promised to him; then we propose to follow that up by showing the cost of taking it out. That is certainly proper.

"Mr. ORTON.—We object to it as calling for an improper element of damage. The proper element of damage in a case on an agreement to give a lease would be the value of the lease; not of any profits that might have been made upon it.

"The COURT.—I think this question is proper. The proper measure of damage in a case of this kind would be the natural flow from the lease or contract, and if the plaintiff shall be able to establish what those profits are or might have been with any degree of certainty he should have the right to do so, undoubtedly. Objection overruled.

"Q. You may answer the question then, Mr. Anderson.

"The COURT.—Of course anything like speculative or conjectural or future profits would naturally be incompetent. The law requires that those profits be stated with absolute certainty in matters of this kind, or requires the greatest degree of certainty. Go ahead.

"Q. Answer the question. Under what circumstances did you work that claim?

"A. I worked a lease in partnership with Mr. Berger on the Metson Bench, as I had a lease on the north half and he had a lease on the south half, and we joined together and went in as one, and worked it that way during the winter of 1905 and 1906."

15.

The Court erred in overruling the objection of the defendant to the next question asked the witness, Andy Anderson, the question, answer and ruling of the court being as follows:

"Q. Now, you may state whether or not you worked out any ground south of the line upon the ground leased to Berger, that is to say, the south half of the claim?

"Mr. ORTON.—That is objected to, if your Honor please, as being irrelevant, incompetent, and immaterial, and not a proper element of damage in this case, and as being an improper and incompetent evidence on the question of damages.

"The COURT.—Objection overruled.

"A. Yes."

16.

The Court erred in overruling the objection of the defendant to the next question asked the wit-

ness, Andy Anderson, the question and other proceedings being as follows:

"Q. Now you may state about what portion of that ground you worked out?

"Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, uncertain and indefinite, and not a proper measure of damage or not a proper element of damage in this case.

"The COURT.—Objection overruled.

"The COURT.—Now, your attention is called to the south half of the claim.

"The WITNESS.—Yes, I understand.

"Q. Answer the question.

"A. We worked out a part, I should judge, about two hundred feet from the northeast end line down a little ways—I could not say just how far the distance was—in a kind of a circle—I should judge, perhaps, fifty feet from the line; the length of it I would not be able to state now."

17.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question and the other proceedings being as follows:

"Q. Did you discover any pay there?

"Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, and incompetent upon the question of damage, not a proper element of damage in this case. There is no presumption that this witness and the plaintiff would sink in the same place, were the plaintiff working the lay.

"The COURT.—Objection overruled.

"A. There was some pay there."

18.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question and the other proceedings being as follows:

"Q. Did you take out the pay there.

"Mr. ORTON.—That question is objected to on the ground that it is irrelevant, incompetent and immaterial, and as not being a proper element of damage in the case, and not being proper or competent evidence on the question of the measure of damages.

"The COURT.—We overrule the objection. Of course, if there was a well defined paystreak it is competent to prove and to show that the plaintiff would have undoubtedly sunk in the same place that this witness and other laymen did; otherwise I do not think it would be material or a proper measure of damages.

"Mr. COCHRAN.—We will prove by the plaintiff himself that he would have sunk from the indications by other workings in the same neighborhood upon identically the same ground and upon identically the same position as these other workmen did, and that if we had been permitted to work the ground the plaintiff would have taken out the same pay.

"Mr. ORTON.—I don't think that kind of evidence is competent, if your Honor please. I also object to the statement of counsel because the Court

has already ruled in their favor and there is no occasion for a speech to the jury at this time; there is nothing before the Court.

"Mr. COCHRAN.—We are presenting it at this time for the reason that we intend to follow this testimony with the testimony of the plaintiff himself that we would have sunk upon that ground if the defendant had complied with his contract, which is the best evidence that the circumstances will permit, and we have a right to show the amount of pay extracted from the workings upon this ground by the best evidence the circumstances will permit,—which goes to show the damages that might accrue to the plaintiff by reason of the failure of the defendant.

"The COURT.—Of course, under the Court's view it devolves upon you to prove with reasonable certainty that you would have realized profits had the defendant performed his part of the contract.

"Mr. COCHRAN.—We are going to show that the pay lies upon a line extending from the northern portion of the claim to the southern portion of the claim; that during the period of this lease that pay was discovered in a well-defined paystreak adjoining this ground involved in this lease, right immediately adjoining it on the north, and extending in a well-defined paystreak through the southerly portion of the claim. The evidence will show that we would have started our prospecting where this pay was found, and that we would have then struck this pay had we been permitted to work, if they had

complied with their contract, and would have developed the same paystreak that Mr. Anderson and Mr. Berger, laymen upon this ground, and would have derived the same profits because we expect to show that they had examined the ground before.

"Mr. ORTON.—We certainly object to the statement of counsel, because there is nothing in the record in this case for him to base such statements upon, and nothing whatsoever to show that Mr. Chilberg would have sunk his prospect shafts in the same place that Anderson and Berger did, or that he would have struck the same paystreak, or anything of the kind.

"The COURT.—It seems to me there might be two methods of proving what the damages could be in this case: One is to call witnesses to testify upon opinion simply as to what the value of this lease was, and the mode that the plaintiff has now adopted, that is of trying to ascertain what the plaintiff could have realized from the lease had the defendant not committed the breach—

"Mr. COCHRAN.—I agree with the Court except that I think the word 'would' is proper instead of the word 'could.'

"Mr. ORTON.—We shall object to this line of testimony upon the grounds before stated; that is that it is incompetent, irrelevant and immaterial, and not a proper element of damages, and as incompetent evidence to prove the proper measure of damages in this case.

"The COURT.—Objection overruled; proceed.

"A. Yes, sir."

19.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question and other proceedings being as follows:

"Q. State to the jury, Mr. Anderson, how you worked this ground?

"Mr. ORTON.—Objected to as incompetent, irrelevant, and immaterial and not a proper element of damages and as calling for incompetent and irrelevant evidence on the question of the measure of damages.

"The COURT.—Objection overruled.

"A. Why, we sunk a shaft on the south half of the claim, and ran a drift, in that drift we stopped where we were on the north half, and connected the two, and then we put up a hoist on that south shaft and took out a dump there; that is we worked the two faces as one, connected them and worked them together so that we hoisted out of the two shafts."

20.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question, and other proceedings being as follows:

"Q. (By Mr. PACKWOOD.) Did you find the pay in the first shaft you sunk on the south side of the ground, I mean?

"Mr. ORTON.—That is objected to as immaterial.

"The COURT.—Overruled.

"A. Well, I don't remember which shaft we got bedrock with first; we found, however, we found

pay on the north half, in the shaft on the north half; in the shaft on the south half the pay was weak; we didn't hardly consider that it was pay there at the time we found it."

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, which question and answer and the other proceedings being as follows:

"Q. Can you state about what you took out of the south dump, in value?

"Mr. ORTON.—That is objected to, if the Court please, as being irrelevant, incompetent and immaterial, and because it already appears from the evidence of this witness that the south dump was taken from both sides, the north and the south half of the claim, and that the dirt was commingled from the two sides and he certainly could not testify as to the value of the portion from the south half.

"The COURT.—Objection overruled.

"Mr. ORTON.—I would like also to add that Mr. Kjelsberg had nothing whatsoever to do with the commingling of the dirt in this dump, or that it was not in any way connected with this authority.

"The COURT.—Objection overruled.

"Q. Do you know anywheres near what was taken from the south dump, in value, Mr. Anderson?

"Mr. ORTON.—We make the same objection, that it is irrelevant, incompetent and immaterial, not the proper measure of damages, and because it already appears from this witness' testimony that the dirt in the south dump was commingled from the two

sides of the claim, and therefore he could not testify as to the value of the portion taken from the south half.

"The COURT.—Objection overruled.

"A. I can't state accurate.

"Q. Well, about as near as you can state it?

"Mr. ORTON.—I desire to object to this question upon all the grounds as the last preceding question, to wit: Objected to on the grounds that it is irrelevant, incompetent and immaterial and not the proper measure of damage in this case, and upon the further grounds that the witness has just answered that he cannot state with any degree of accuracy, that the dirt was commingled in the south dump from the two sides of the claim, and therefore any testimony he would give as to the value of the gold-dust taken from the south dump would be irrelevant, incompetent and immaterial in this case.

"The COURT.—Objection overruled.

"A. The nearest I can say, there was about in the south dump, the amount was somewheres between forty and forty-five thousand dollars."

21.

The Court erred, after the witness, Andy Anderson, had stated that he could state with reasonable certainty from his knowledge as a practical miner, and from pannings and prospects taken from that portion of the ground lying south of a line between the north half and the south half of the Metson Bench, the amount of gold and gold-dust that was taken from the southerly portion of the claim by him in his operations upon the ground during the winter

of 1905-06, in overruling the objection of the defendant and permitting the witness to state the amount to be about twenty thousand dollars.

22.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, to state what would be the reasonable and ordinary expense of extracting the pay-dirt and mining and sluicing it up in the ordinary method of mining in this district, the answer of the witness, Andy Anderson, being that it might cost thirty per cent and would not be more than thirty-five per cent in the manner in which he mined it.

23.

The Court erred in overruling the objection of the defendant to the following question asked the witness, Andy Anderson, said question and other proceedings being as follows, to wit:

"Q. To get that clear before the jury I will ask you this question: You may state whether or not in your opinion and according to your best judgment, the south half of the Metson Bench produced more than twenty thousand dollars or less than twenty thousand dollars from your operations of that portion of the ground during the winter of 1905 and 1906?

"Mr. ORTON.—To which defendant objected on the ground that the question is irrelevant, incompetent, and immaterial, as not being a proper element of damage, and also in addition to all these objections we make the further objection which I un-

derstand your Honor has already ruled upon, the question has already been asked and answered.

"The COURT.—We overrule the objection.

"A. Well, I don't think—it might have been a little more, but it would not be much, and I don't think that it was less; I feel that it was not less."

24.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, to testify as to what ground lay immediately north of the Metson Bench, also as to what other claim adjoined the Metson Bench on the north, and also in allowing and permitting the witness, Andy Anderson, over the objection of the defendant, to testify that this claim was a valuable claim.

25.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, to state that there had been pay found on the Portland Bench at the time that plaintiff contends the defendant had given him the lease, and that the Portland Bench Claim was a valuable claim.

26.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, that he considered the Metson Bench a good place to prospect for gold at the time he entered into the lease for the north half of the Metson Bench.

27.

The Court erred in permitting the plaintiff when testifying in his own behalf to answer the following question over the objection of the defendant, the

question, answer of the witness and other proceedings being as follows:

"Q. Where did you intend to sink a shaft had you worked the ground, under your lease?

"Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial and not a proper basis on which to estimate damages, as being too uncertain.

"A. I was going to go about the middle line, anyway, I always had an idea that the pay was down in that direction on account of the Portland Bench being up on the one side, Kiowa Bench on the other."

28.

The Court erred in permitting the plaintiff, Chilberg, when testifying in his own behalf, to answer the following question over the objection of the defendant, said question, and the other proceedings being as follows:

"Q. State whether or not Mr. Chilberg, you had made up your mind where you would sink a hole upon this ground, had Mr. Kjelsberg complied with his agreement in regard to giving you a lease on the south half of it?

"Mr. ORTON.—Objected to as immaterial, because the witness has not yet shown that he had made up his mind to work it at all.

"The COURT.—Overruled.

"A. I had."

29.

The Court erred in permitting the plaintiff, Mr. Chilberg, when testifying in his own behalf, to an-

swer the following question over the objection of the defendant, said question and other proceedings being as follows:

"Q. Where did you intend to sink that hole with reference to the workings testified to by Mr. Anderson?

"Mr. ORTON.—That is objected to as being irrelevant, incompetent, immaterial and as having no bearing upon the question of damages, particularly as the workings of Mr. Anderson were upon another part of the claim.

"The COURT.—Objection overruled.

"A. Well, I had thought—I had made up my mind to work on that on the south—or on the south half rather, in the southeast corner—

30.

The Court erred in permitting the plaintiff, when testifying in his own behalf, to answer the following question over the objection of the defendant, said question and the other proceedings being as follows:

"Q. If there had been any *point* at the point where you intended to prospect this ground would you have discovered that pay if you had worked your lease?

"Mr. ORTON.—Now, if the Court please, that is objected to as incompetent, irrelevant and as calling for a conclusion of the witness.

"Mr. PACKWOOD.—I desire to hand this exhibit to the witness, if the Court please.

"Mr. ORTON.—No, your Honor, I object to this exhibit being shown to the witness, if the Court

please, for him to testify that he would have sunk a shaft in exactly the same place where it is shown upon this plat that Anderson and Berger sunk their shaft in which they discovered their pay. We think he should testify first to the point where he intended to sink his shaft, if at all, without his being permitted to take this exhibit and pick out the identical spot from it, where by the workings of these other men the pay was located.

"Mr. PACKWOOD.—I think we are entitled to hand this plat to the witness for the purpose of getting his testimony clearly before the jury.

"The COURT.—We permit the exhibit to be shown to the witness.

"Mr. ORTON.—We save an exception, if your Honor please, to the Court's ruling that it may be shown to the witness over the objections of the defendant, as highly prejudicial to the rights of the defendant.

"A. Well, I think I would, yes."

31.

The Court erred in permitting the plaintiff when testifying in his own behalf, to answer the following question over the objection of the defendant, said question and the other proceedings being as follows:

"Q. After you discovered the pay could you have taken it out?

"Mr. ORTON.—That is objected to as being incompetent, irrelevant and immaterial, and calling for the conclusion of the witness and further because it has not been shown in the evidence in his

testimony that there was any pay where he said he was intending to prospect.

"The COURT.—Objection overruled.

"Q. And would you have done so?

"Mr. ORTON.—We make the same objection, that it is incompetent, irrelevant and immaterial, and it is not a proper measure of damages, and as not being the measure of damages as alleged in the complaint.

"The COURT.—Objection overruled.

"A. I certainly would."

32.

The Court erred in permitting the plaintiff when testifying in his own behalf, over the objection of the defendant to answer the following question, said question and other proceedings being as follows:

"Q. (By Mr. PACKWOOD.) (Witness is handed Defendant's Exhibit 'A' and asked.) State if there had been any pay within the boundaries marked on that paper as having been worked out between the double lines there on with the letter x x x, if you had been permitted to work your lease, if you would have discovered that pay?

"Mr. ORTON.—That is objected to as calling for the conclusion of the witness, asking merely and solely for a prophecy upon his part, as to what he would have done, and as being a question which is impossible for any one to answer.

"The COURT.—Objection overruled.

"A. Well, as I stated before, it was my intention to work that portion of the claim, and I don't see how I could miss the paystreak there.

"Mr. ORTON.—Now, I move to strike that out as not responsive to the question.

"The COURT.—Motion overruled."

33.

The Court erred in permitting the plaintiff when testifying in his own behalf, over the objection of the defendant, to answer the following question, said question and the other proceedings being as follows:

"Q. Now, Mr. Chilberg, you may state whether or not if Mr. Anderson or any one else had sunk a shaft or hole, during the winter of 1905—or during the months of October, November or December, 1905, at that point marked 'B' there, and had discovered pay there in that hole, that if from that circumstance and that fact, you would have been able to locate the pay on the south half of the Metson Bench."

"Mr. ORTON.—That is objected to as being irrelevant, incompetent and immaterial, and calling for the conclusion of the witness, the reason that one person had discovered pay on one end of a claim, or on an adjoining claim, across the line and at a considerable distance from it, and also a hole having been sunk after the time of the alleged breach was committed, on the self same ground, namely by the lessee, Mr. Berger, of the self same ground, is certainly wholly incompetent, irrelevant and immaterial, and not proper in this case, and as calling for a conclusion, wholly, from the witness.

"The COURT.—Objection overruled.

"A. Well, it certainly would be very easy then to find the paystreak, under those circumstances, if I knew them, certainly.

34.

The Court erred in permitting the plaintiff when testifying in his own behalf, over the objection of the defendant to answer the following question, said question and the other proceedings being as follows:

"Q. Would you have found the paystreak under that state of facts?

"Mr. ORTON.—Same objection.

"The COURT.—Objection overruled.

"Mr. ORTON.—It simply calls for the conclusion of the witness. That might be proper for the jury to determine from all the evidence submitted to them.

"The COURT.—Well, he has testified to matters within his own consciousness—I don't see how he can be deprived of testifying to his opinion upon that subject.

"Mr. ORTON.—The further objection to the question is, that those shafts referred to were sunk at a time on the premises adjoining after the time when the alleged breach of this contract of a mining lease was committed upon the self same ground, by the same Mr. Berger, who held the lease for the same ground for the same period.

"The COURT.—Objection overruled.

"Q. Under the state of facts, that a shaft had been sunk right here at the point marked 'b' on this exhibit, and pay found, would you then have found the paystreak, had you been permitted to work this ground under your lease?

"Q. Well, yes, I think I would."

35.

The Court erred in permitting the plaintiff when testifying in his own behalf to answer the following question over the objection of the defendant, said question and other proceedings being as follows:

"Q. Well, I will just adopt the Court's question. If you had followed out the plan which you already have stated in regard to mining the Metson Bench under the lease which had been promised you by Mr. Kjelsberg, would you have discovered pay?

"Mr. ORTON.—Same objection, that the question is too speculative and uncertain, and is incompetent, irrelevant and immaterial, and as calling for a conclusion of the witness.

"The COURT.—Objection overruled.

"A. This is the xx here. (Referring to Ex. 'A.') This is on the south half of the claim, is it?

"Q. Well, I say *you* would have discovered pay there under these circumstances?

"Mr. ORTON.—I make all the same objections as to the last two preceding questions.

"The COURT.—Overruled.

"A. I think I would; I don't see how I could have missed it."

36.

The Court erred in permitting the plaintiff when testifying in his own behalf to answer the following question over the objection of the defendant, said question and the other proceedings being as follows:

"Q. If you found the pay upon the ground, Mr. Chilberg, how did you contemplate working upon the ground?

"Mr. ORTON.—Objected to for all the reasons before stated, together with the further objection that it is too speculative, being based upon something which is too speculative, that is, the question of whether or not he found the pay.

"The COURT.—Objection overruled.

"A. Well, it depended on the pay I found how I would work it. I would probably use a windlass to prospect, until I found pay, and then put up a hoist, undoubtedly; that was my intention."

37.

The Court erred in sustaining the objection to the question asked the witness, Jacob Berger, by defendant's attorney, said question and other proceedings being as follows:

"Q. Now, Mr. Berger, at the time you obtained your lease and went to work out there under it, state whether or not a lease, being a lease of forty per cent to the owner and sixty per cent to yourself, was of any substantial value?

"Mr. COCHRAN.—That is objected to as being irrelevant, incompetent and immaterial, and not a proper measure of damage in this case."

38.

The Court erred in sustaining the objection to the question asked the witness, Jacob Berger, by defendant's attorney, said question and other proceedings being as follows:

"Q. Mr. Berger, I will ask you to state whether or not a lease under terms such as you have stated that you had, that is, forty per cent to the owner and sixty per cent to the lessee, on ground such as the

Metson Bench, on which pay had not yet been discovered, was of any value other than a speculative value?

"Mr. COCHRAN.—Objected to as being irrelevant, incompetent and immaterial for any purpose, and not a proper measure of damage in this case.

"The COURT.—Objection sustained."

39.

The Court erred in sustaining the objection to the question asked the witness, Jacob Berger, by defendant's attorney, said question and other proceedings being as follows:

"Q. Mr. Berger, I will ask you if you can state whether or not a lease of the character which you had at that time, of the terms of which I have just enumerated, was at that time of any value?

"Mr. COCHRAN.—That is objected to, if the Court please, on the grounds that it is wholly irrelevant, incompetent, and immaterial for any purpose, and not a proper measure of damage in this case.

"The COURT.—Objection sustained.

IRA D. ORTON,
Attorney for Defendant.

United States of America,
District of Alaska,—ss.

Due service of the within Assignment of Errors is hereby accepted at Nome, Alaska, this 1st day of Feb., 1909, by receiving a copy thereof.

O. D. COCHRAN,
Attorney for Plff.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Assignment of Errors. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 1, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. Ira D. Orton, Attorney for Deft. McB.

In the District Court, District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Petition for Writ of Error [and Order Allowing Writ of Error].

The defendant in the above-entitled action, considering himself aggrieved by the verdict of the jury and the judgment thereon, comes now by Mr. Ira D. Orton, its attorney, and petitions the Court to allow a Writ of Error to review said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and further prays that an order be made fixing the amount of security to be given by petitioner.

Dated at Nome, Alaska, October 20, 1908.

IRA D. ORTON,

Attorney for Defendant, Kjelsberg.

It is hereby ordered, that the foregoing Writ of Error be, and the same is hereby allowed, upon petitioner giving bond for costs in the sum of two hundred and fifty dollars.

Dated at Nome, Alaska, October ——, 1908.

ALFRED S. MOORE,

Judge of the District Court, District of Alaska, Second Division.

United States of America,
District of Alaska,

Due service of the within Petition for Writ of Error is hereby accepted at Nome, Alaska, this 1st day of Feb., 1909, by receiving a copy thereof.

O. D. COCHRAN,
Of Attorney for Pltff.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Mangus Kjelsberg, Defendant. Petition for Writ of Error and Order Allowing Same. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 1, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. Ira D. Orton, Attorney for Deft. Vol. 7, Orders and Judgments, p. 44, Comp. McB.

In the District Court, District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff.

vs.

MAGNUS KJELSBERG,

Defendant.

Bond on Writ of Error.

Know All Men by These Presents: That we, Magnus Kjelsberg, as principal, and J. J. Cole, and C. G. Cowden, as sureties, are held and firmly bound unto B. A. Chilberg, plaintiff in the above-entitled case, in the sum of two hundred and fifty ($250.00) dollars, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 1st day of February, A. D. 1909.

Whereas, lately at a session of the above-entitled court, in an action pending in said court between B. A. Chilberg, plaintiff, and Magnus Kjelsberg, defendant, a judgment was on the 17 day of June, 1908, rendered in favor of said plaintiffs and against said defendant, and the said defendant having obtained from the said District Court, on order allowing a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to review said judgment, and a citation directed to said *A. B.* Chilberg, is about to be issued, citing and admonishing him to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, State of California.

Now, therefore, the condition of the above obligation is such, that if the said Mangus Kjelsberg, shall prosecute his said Writ of Error to effect, and an-

swer all costs, if he fails to make his plea good, then this obligation shall be void; otherwise it shall remain in full force and effect.

MAGNUS KJELSBERG. [Seal]
By IRA D. ORTON,
His Attorney.

J. J. COLE. [Seal]
C. G. COWDEN. [Seal]

United States of America,
District of Alaska,—ss.

J. J. Cole and C. G. Cowden, being first duly sworn, each for himself, deposes and says:

That he is one of the sureties on the foregoing bond; that he is worth the sum of $250 over and above all debts and liabilities and exclusive of property exempt from execution; that he is a resident of the District of Alaska, and is not a marshal, deputy marshal, attorney or counselor at law, commissioner, clerk of any court or other officer of any court.

J. J. COLE.
C. G. COWDEN.

Subscribed and sworn to before me this 1st day of February, A. D. 1909.

[Notarial Seal] LAWRENCE S. KERR,
Notary Public in and for the District of Alaska, Residing at Nome.

The foregoing bond on Writ of Error is hereby approved this 1st day of February, 1909, in open court at Nome, Alaska.

ALFRED S. MOORE,
Judge of the District Court, District of Alaska, Second Division.

[Endorsed]: #1559. Original. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Bond on Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 1, 1909. Jno. H. Dunn, Clerk. By ————, Deputy. Ira D. Orton, Attorney for Deft. Civil Bonds #4, Page 246. Comp.

In the District Court, District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Writ of Error [Copy].

The President of the United States of America, to the Honorable Judge of the United States District Court, for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between B. A.

Chilberg, plaintiff, and Magnus Kjelsberg, defendant, a manifest error hath happened, to the great damage of Magnus Kjelsberg, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and all things concerning the same, to the Justice of the United States Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said Circuit on the 1st day of March, 1909, and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of February, 1909.

Attest my hand and the seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's Office at Nome, Alaska, this 1st day of February, 1909.

[Seal] JNO. H. DUNN,
Clerk of the United States District Court, District of Alaska, Second Division.

Allowed this 1st day of February, 1909.

[Signed] ALFRED S. MOORE,
Judge of the United States District Court, District of Alaska, Second Division.

Personal service of the foregoing Writ of Error admitted February 1st, 1909.

O. D. COCHRAN,
Of Attorney for Deft. in Error.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Lodged Copy Writ of Error. The within copy of Writ of Error lodged in the Clerk's Office for the District of Alaska, Second Division, for Defendant in Error, the 1st day of February, 1909. ————, Clerk. Ira D. Orton, Attorney for Deft. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 1, 1909. Jno. H. Dunn, Clerk. By ————, Deputy.

UNITED STATES OF AMERICA.

District Court, District of Alaska, ——— Division.

Cause No. ——.

CHILBERG,

Plaintiff,

vs.

KJELSBERG,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript on Writ of Error.

IRA D. ORTON,
Atty. for Deft.

NOTICE.—Attorneys will please endorse their own filings. Rule 47.

[Endorsed]: Cause No. 1559. District Court, District of Alaska, ——— Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Praecipe. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Mar. 20, 1909. Jno. H. Dunn, Clerk. By ———, Deputy.

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court for the District of Alaska, Second Division.

No. 1559.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

CLERK'S CERTIFICATE.

I, John H. Dunn, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 140, both inclusive, are a true and exact transcript of the Complaint, Summons, Demurrer to Complaint, Minutes of Court of Sept. 22, 1906 (demurrer overruled), Answer, Reply, Minutes of Court during trial, Verdict, Motion for New Trial, Order Overruling Motion for New Trial, Judgment Entry, Bill of Exceptions, Assignment of Error, Petition for Writ of Error and Order Allowing Same, Bond on Writ of

Error, Lodged copy Writ of Error, and Praecipe for Transcript on Writ of Error, in the case of B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant, No. 1559, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; also certify that said transcript contains all the pleadings in the above-entitled case; and that the original Writ of Error and original Citation are attached to this transcript.

Cost of transcript $72.65, paid by Ira D. Orton, Attorney for defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 24 day of March, A. D. 1909.

[Seal] JNO. H. DUNN,
Clerk.
By Angus McBride,
Deputy.

In the District Court, District of Alaska, Second Division.

B. A. CHILBERG,

Plaintiff,

vs.

MAGNUS KJELSBERG,

Defendant.

Writ of Error [Original].

The President of the United States of America, to the Honorable Judge of the United States District Court, for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between B. A. Chilberg, plaintiff, and Magnus Kjelsberg, defendant, a manifest error hath happened, to the great damage of Magnus Kjelsberg, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid, in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and all things concerning the same, to the Justices of the United States Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said Circuit on the 1st day of March, 1909, and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of February, 1909.

Attest my hand and the seal of the United States District Court for the District of Alaska, Second

Division, at the Clerk's Office, at Nome, Alaska, this 1st day of February, 1909.

[Seal] JNO. H. DUNN,

Clerk of the United States District Court, District of Alaska, Second Division.

Allowed this 1st day of February, 1909.

ALFRED S. MOORE,

Judge of the United States District Court, District of Alaska, Second Division.

Personal service of the foregoing writ of error admitted February 1st, 1909.

O. D. COCHRAN,

Of Attorneys for Deft. in Error.

[Endorsed]: # 1559. In the District Court for the District of Alaska, Second Division. B. A. Chilberg, Plaintiff, vs. Magnus Kjelsberg, Defendant. Writ of Error. Ira D. Orton, Attorney for Deft.

Citation and Return [Original].

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to B. A. Chilberg, Defendant in Error, and O. D. Cochran and W. H. Packwood, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within 30 days from the date of this writ, pursuant to a writ of error, filed in the Clerk's Office of the District

Court, District of Alaska, Second Division, wherein, Magnus Kjelsberg, is plaintiff in error, and you, said B. A. Chilberg, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 1st day of February, 1909, and of the Independence of the United States, the one hundred and thirty-third.

ALFRED S. MOORE,

Judge of the District Court, District of Alaska, Second Division.

Personal service of the foregoing citation is hereby admitted February 1st, 1909.

O. D. COCHRAN,

Of Attorneys for Defendant in Error.

[Endorsed]: #1559. In the District Court for the District of Alaska, Second Division. Magnus Kjelsberg, Plaintiff in Error, vs. B. A. Chilberg, Defendant in Error. Original Citation. ~~Filed in the office of the Clerk of the Dist. Court of Alaska Second Division, at Nome. Feb. 1 1909. Jno. H. Dunn, Clerk. By .....Deputy.~~ Ira D. Orton, Attorney for ————.

[Endorsed]: No. 1716. United States Circuit Court of Appeals for the Ninth Circuit. Magnus Kjelsberg, Plaintiff in Error, vs. B. A. Chilberg, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

Filed May 14, 1909.

F. D. MONCKTON,
Clerk.

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No. 1716

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAGNUS KJELSBERG,

Plaintiff in Error,

vs.

B. A. CHILBERG,

Defendant in Error.

Brief for Plaintiff in Error.

IRA D. ORTON,
Attorney for Plaintiff in Error.

CAMPBELL, METSON, DREW, OATMAN & MACKENZIE, and
E. H. RYAN,
Of Counsel.

THE JAMES H. BARRY CO.
1122-1124 MISSION ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAGNUS KJELSBERG,
Plaintiff in Error,

vs.

B. A. CHILBERG,
Defendant in Error.

No. 1716.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This was on its face an action brought to recover damages for the breach of an alleged oral agreement made and entered into on September 1, 1905, between the plaintiff in error and the defendant in error, but actually an action for failure to carry out an alleged agreement to lease a piece of mining ground.

The complaint set up that on September 1, 1905, and for about a year prior thereto, the parties to the action were co-partners in a business known as the Discovery

Saloon, in the town of Nome, being equally interested in the profits. That on September 1, 1905, Magnus Kjelsberg was desirous of terminating the partnership and of acquiring the interest of Chilberg therein.

That on or about that day Kjelsberg and Chilberg entered into an oral agreement, by the terms of which Chilberg conveyed and delivered to one Gordon, at the request of Kjelsberg, the stock on hand, and assigned and transferred to Gordon the unexpired liquor and cigar licenses for conducting the business; that in consideration of such action on Chilberg's part, Kjelsberg agreed that he would give to Chilberg the whole of the net profits realized during the partnership, that he would take over and pay for all stock that had been ordered and not yet received by Chilberg, including a phonograph, and in further consideration would give and execute to Chilberg a lease upon the south half of the Metson Bench, a claim situated on Little Creek, in the Cape Nome Mining District, covering the period of the winter mining season of 1905, and the spring of 1906, Chilberg to pay a royalty of 40 per cent. on all gold extracted from said claim.

The complaint alleges a performance on the first day of September, 1905, on the part of Chilberg of the terms of said agreement, and a failure on the part of Kjelsberg to carry out his agreement, in that the latter failed to make or deliver the lease upon the Metson Bench alleged to have been agreed upon; but that on

the contrary, Kjelsberg executed and delivered a lease to one J. Berger on said ground.

Damages for the breach is prayed for in the sum of $50,000.

The answer of Kjelsberg admits the partnership, but sets up that when the agreement to dissolve was entered into, it was upon the understanding that Kjelsberg was to and did give all the profits of the business theretofore conducted by them to Chilberg, also that he was to pay Chilberg and did pay to him one-half the value of the stock on hand, and a considerable sum of money besides; that while half the stock on hand was worth less than $1000, he paid that sum to Chilberg, and also further agreed to take over and pay for, and did take over and pay for all stock ordered and not received.

Denies that he ever agreed for the consideration named in the complaint, or for any consideration whatever, that he would give to Chilberg any lease whatever on the Metson Bench claim.

In the reply of Chilberg he denies the allegations of the answer relative to the terms of the copartnership settlement.

Upon these issues the case went to trial before a jury on April 6, 1908, and the following facts are disclosed by the record.

THE FACTS.

Some time in the early part of September, 1904, Chilberg and Kjelsberg entered into a partnership in the Discovery Saloon business in Nome. This partnership continued up to September, 1905, when negotiations were entered into looking to a dissolution. Kjelsberg wanted to transfer his interest to a man by the name of Gordon and also wanted to buy out the interest of Chilberg for the same purpose. After some discussion, the terms of the dissolution were agreed upon. According to the testimony offered by Chilberg (the only testimony on the point), he on the 5th of September, 1905, transferred his interest in the business to Gordon, including the license which had a period of two months to run. Kjelsberg paid him as a consideration for so doing, all of the profits that had accrued during the preceding year; also paid him for his share of the stock on hand and for the value of the unexpired term of the license to carry on the business, and gave him a gift of $20. He testifies that Kjelsberg then told him that in addition he would give him a lease on the south half of the Metson Bench mining claim for the winter season of 1905 and 1906, on a royalty of forty per cent, but that there was no date set for it to begin or day upon which it was to end.

Chilberg, while testifying that he knew there was no necessity for a lease covering a period less than a year to be in writing, stated that the lease was to be in writ-

ing and Kjelsberg never executed it. On being about to leave Nome, and while on the steamer, Chilberg testifies Kjelsberg said he would leave instructions with plaintiff's nephew, one Eugene Chilberg, to make out a lease for the plaintiff. Thereafter Chilberg asked his nephew for the lease, and the latter stated that a lease had been promised one Berger, and that he had had no instructions from Kjelsberg to make a lease to Chilberg (Tr., 83).

Eugene Chilberg said he wrote to Kjelsberg for advices, but too late to get a response before the close of navigation, and so he made out a lease to Berger (Tr., 85).

Chilberg never took any steps in the matter other than as above set forth; never made any attempt to go out on the ground and work it, nor did he ever make any attempt to communicate directly with Kjelsberg either by letter or wire. He did not again see Kjelsberg until the summer of 1906, and at that time did not speak to him with reference to the lease. He did nothing at all, in fact, until he instituted the suit, after the clean-up in 1906 showed the ground to have values.

At the time of the alleged negotiations with regard to the lease Chilberg stated that he knew nothing personally about the ground, had never been on the south half of the claim, had neither prospected nor panned there, and that although he knew some holes had been sunk on the ground, did not know on what part they had been sunk (Tr., 40).

In October, 1905, Berger took possession of the south half of the Metson Bench under his lease. At this time one Andy Anderson was working on the northerly half under a lease. He had an outfit on the ground, and his half partly opened up, when Berger came on to the southerly half. He and Berger decided to go into partnership and work the two halves as a whole, as the same could be done more economically and to better advantage.

At this time (the latter part of October), when they began prospecting on the ground, no pay had been discovered, the ground had not been shown to have any value. Pay was not discovered until a month later (Tr., 49). This would be in the latter part of November when the ground first began to show values. The pay was very weak in the south half. In fact, both Berger and Anderson were contemplating abandoning their workings because of the value of the pay they found in the first shaft they had sunk on the south half of the claim (Tr., 63, 65, 66). Point A on the diagram (Tr., 64, 66). The piece of pay on the south half in the segment of the circle shown on said diagram, was not discovered until some four or five months after they had started to work, namely, in the middle of March, 1906.

Some attempt was made to show that the south half of the Metson Bench had some probable value at the time of the execution of the leases to Anderson and Berger by reason of the value of an adjacent claim,

the Portland Bench; but it appeared that the Portland Bench referred to only had a little irregular strip that came up and adjoined the Metson Bench on the east of the said south half a few feet wide, and that the pay in that claim was on the other side of the Portland to the north (Tr., 71, 72, 91).

In fact, Anderson testified (for the plaintiff), that when he took the lease on the north half of the claim there was nothing to indicate that there were any values in the claim, but that there were some indications of small pay 150 feet beyond its northwest corner on the Brown Claim, where he had been working, and that was the reason he took the lease on the north half. That he started work at this point, but the pay didn't amount to much and he finally abandoned it (Tr., 65). That he did not consider the south half a good proposition at 40 per cent at that time, there being no indications whatever of pay.

When Anderson and Berger began operations, two shafts were sunk, one on the north half and one on the south half; drifts were run connecting the two shafts, which were 40 to 60 feet apart. A hoist was put up on the south shaft and a dump taken out there. Both faces of the shafts were worked as one, and the dirt was hoisted out of both; all of the dirt taken from the two shafts on the different segments of ground was mixed and thrown together. The dirt was piled up in three dumps on both halves of the ground, but the dirt was commingled in the southern dump (Tr., 48, 50).

It appeared further that the amount of gold taken out of the whole ground was estimated at some forty or forty-five thousand dollars, and a rough estimate of from $15,000 to $20,000 was accredited to the south half. Owing to the character of the working of the two halves and the commingling of the dirt, no accurate estimate could be arrived at. Anderson testified that the cost of removing it would be about 35 per cent., but owing to the fact that he had an outfit on the ground and had his ground partly opened up, that the expense for the southern half was thereby decreased (Tr., 60). Berger testified that the cost of production was from 40 to 50 per cent for every dollar that came out of the ground (Tr., 91).

Berger had in addition to the shaft "A" put down other shafts, sunk drill holes and betrayed unusual diligence in prospecting the entire south half, and testified that if he had operated only on the southerly half under his lease instead of joining forces with Anderson on both halves, and had found the block of pay as indicated on the diagram and worked economically, that he would just about have made a "stand-off"; that he might have made a very small profit and might have made a small loss.

This is practically the substance of the testimony which went to the jury, who returned a verdict against the defendant Kjelsberg for $2,000. From the judgment based on such verdict the defendant prosecutes this writ of error, and for grounds of reversal assigns the following errors:

SPECIFICATIONS OF ERRORS.

I.

The Court erred in instructing the jury as follows:

"That the rule of law is, that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement to lease, he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain."

II.

The Court erred in instructing the jury as follows:

"So far as money can do it the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased."

III.

The Court erred in instructing the jury as follows:

"Proof of the profits may be made by showing what profits were made under a like lease by other parties, if the proof further shows that the party

who was to have the lease would have worked the premises practically in the same manner as the persons who had worked the same."

IV.

The Court erred in instructing the jury as follows:

"The Court instructs the jury that if you find from the evidence that pay dirt and gravel has been mined from said premises agreed to be leased to the plaintiff (if you find such an agreement existed), by other lessees of the defendant during the period of time for which plaintiff was to have a lease thereon; and you further find with probable certainty that the plaintiff, if he had been permitted to work said lease agreed upon would have discovered said pay-dirt and gravel, and would have worked and mined the same at a profit, you will find for the plaintiff, and in that case his measure of damages is that profit, if any, which would have been derived during the term of the lease agreed upon between the defendant and plaintiff, if any such an agreement existed, after first deducting the royalty agreed upon and reasonable costs of mining and extracting the values from said pay-dirt and gravel."

V.

The Court erred in instructing the jury as follows:

"And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form some-

what more concrete, that if they find from the evidence that the defendant during the fall of 1905 entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, District of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another covering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profits which you shall find from the evidence he would have made if the lease agreed upon had been fully performed by him."

VI.

The Court erred in instructing the jury as follows:

"You are instructed in this case to find for the plaintiff for some amount."

VII.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 1:

"The jury are directed to find a verdict for defendant."

VIII.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 1-A:

"Under the evidence in this case no more than nominal damages can be allowed in any event."

IX.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 1-B:

"In assessing the damages, in case you should decide in plaintiff's favor, you are instructed that the measure of plaintiff's damage is the value of the lease claimed by him at the time when the defendant breached the contract."

X.

The Court erred in refusing to give the following instruction requested by the defendant, in writing, numbered 2:

> "You are also instructed that in estimating these damages you should not take into consideration any uncertain or contingent profits which the plaintiff might or might not make from the working of the premises."

XI.

The Court erred in overruling the objection of the defendant to the question propounded to the plaintiff when testifying in his own behalf, which question was propounded after plaintiff had testified that he intended to work the south half of the claim known as the Metson Bench under the lease Mr. Kjelsberg had promised him, and which question was as follows:

"Q. How did you intend to work it." The objection and ruling of the Court being as follows:

> "MR. ORTON—That is objected to as entirely immaterial what the intentions on his part were, and improper upon the question of damages, and it being certainly an attempt to get incompetent questions upon the question of damages in this case.
>
> "THE COURT—He must show that he intended to work the claim; objection overruled.

"A. I was going to put down a shaft, and if I found pay then I was going to put in a hoist and work it just the same as any other claim."

XII.

The Court erred in overruling the objection of the defendant to the next question propounded to the plaintiff, the question, objection, ruling of the Court and answer being as follows:

"Q. Do you know where Mr. Berger sunk his shaft afterwards?

"MR. ORTON—Objected to as incompetent, irrelevant, and immaterial and as having no bearing whatever upon the question of damages.

"THE COURT—Overruled.

"A. Yes, sir."

XIII.

The Court erred in overruling the objection of the defendant to the next question propounded to plaintiff, the question, objection, ruling of the Court and answer being as follows:

"Q. How far, about, was his shaft from the line? That is, about how far from the line dividing the claim in the middle?

"MR. ORTON—Objected to as immaterial.

"THE COURT—Objection overruled.

"A. I don't know exactly how far from the line

it was; I could not tell you just how far it was; all I could say is that he sunk his shaft upon the piece of ground that I was to have a lay on."

XIV.

The Court erred, after the witness Andy Anderson had testified that he was mining on the Metson Bench and was acquainted with the southerly portion of the Metson Bench and had formerly worked thereon, in overruling the objection to the question propounded to him, the question, objection, ruling of the Court and answer being as follows:

"Q. Under what circumstances?

"MR. ORTON—That is objected to as being irrelevant, incompetent, and immaterial and not a proper element of damages in any way.

"MR. COCHRAN—We want to show what they took out of the ground in dispute.

"MR. ORTON—Objected to as irrelevant, incompetent and immaterial and too speculative and remote for a proper basis of damages.

"THE COURT—During the term of Mr. Chilberg's lease, upon the very section of the ground covered by this lease, part of the identical portion of the Metson Bench? I think it is proper.

"MR. COCHRAN—Yes, your Honor. We propose to show what was taken out of the identical portion of the Metson Bench during the very same time for which the lease was promised to him; then

we propose to follow that up by showing the cost of taking it out. That is certainly proper.

"MR. ORTON—We object to it as calling for an improper element of damage. The proper element of damage in a case on an agreement to give a lease would be the value of the lease; not of any profits that might have been made upon it.

"THE COURT—I think this question is proper. The proper measure of damage in a case of this kind would be the natural flow from the lease or contract, and if the plaintiff shall be able to establish what those profits are or might have been with any degree of certainty he should have the right to do so, undoubtedly. Objection overruled.

"Q. You may answer the question then, Mr. Anderson.

"THE COURT—Of course anything like speculative or conjectural or future profits would naturally be incompetent. The law requires that those profits be stated with absolute certainty in matters of this kind, or requires the greatest degree of certainty. Go ahead.

"Q. Answer the question. Under what circumstances did you work that claim?

"A. I worked a lease in partnership with Mr. Berger on the Metson Bench, as I had a lease on the north half and he had a lease on the south half, and we joined together and went in as one, and worked it that way during the winter of 1905 and 1906."

XV.

The Court erred in overruling the objection of the defendant to the next question asked the witness, Andy Anderson, the question, answer and ruling of the Court being as follows:

> "Q. Now, you may state whether or not you worked out any ground south of the line upon the ground leased to Berger, that is to say, the south half of the claim?
>
> "MR. ORTON—That is objected to, if your Honor please, as being irrelevant, incompetent, and immaterial, and not a proper element of damage in this case, and as being an improper and incompetent evidence on the question of damages.
>
> "THE COURT—Objection overruled.
>
> "A. Yes."

XVI.

The Court erred in overruling the objection of the defendant to the next question asked the witness, Andy Anderson, the question and other proceedings being as follows:

> "Q. Now you may state about what portion of that ground you worked out?
>
> "MR. ORTON—That is objected to as being irrelevant, incompetent and immaterial, uncertain and indefinite, and not a proper measure of damage or not a proper element of damage in this case.

"THE COURT—Objection overruled.

"THE COURT—Now, your attention is called to the south half of the claim.

"THE WITNESS—Yes. I understand.

"Q. Answer the question.

"A. We worked out a part, I should judge, about two hundred feet from the northeast end line down a little ways—I could not say just how far the distance was—in a kind of a circle—I should judge, perhaps, fifty feet from the line; the length of it I would not be able to state now."

XVII.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question and the other proceedings being as follows:

"Q. Did you discover any pay there?

"MR. ORTON—That is objected to as being irrelevant, incompetent and immaterial, and incompetent upon the question of damage, not a proper element of damage in this case. There is no presumption that this witness and the plaintiff would sink in the same place, were the plaintiff working the lay.

"THE COURT—Objection overruled.

"A. There was some pay there."

XVIII.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question and the other proceedings being as follows:

"Q. Did you take out the pay there?

"MR. ORTON—That question is objected to on the ground that it is irrelevant, incompetent and immaterial, and as not being a proper element of damage in the case, and not being proper or competent evidence on the question of the measure of damages.

"THE COURT—We overrule the objection. Of course, if there was a well defined paystreak it is competent to prove and to show that the plaintiff would have undoubtedly sunk in the same place that this witness and other laymen did; otherwise I do not think it would be material or a proper measure of damages.

"MR. COCHRAN—We will prove by the plaintiff himself that he would have sunk from the indications by other workings in the same neighborhood upon identically the same ground and upon identically the same position as these other workmen did and that if we had been permitted to work the ground the plaintiff would have taken out the same pay.

"MR. ORTON—I don't think that kind of evidence is competent, if your Honor please. I also object to the statement of counsel because the Court

has already ruled in their favor and there is no occasion for a speech to the jury at this time; there is nothing before the Court.

"MR. COCHRAN—We are presenting it at this time for the reason that we intend to follow this testimony with the testimony of the plaintiff himself that we would have sunk upon that ground if the defendant had complied with his contract, which is the best evidence that the circumstances will permit, and we have a right to show the amount of pay extracted from the workings upon this ground by the best evidence the circumstances will permit,—which goes to show the damages that might accrue to the plaintiff by reason of the failure of the defendant.

"THE COURT—Of course, under the Court's view it devolves upon you to prove with reasonable certainty that you would have realized profits had the defendant performed his part of the contract.

"MR. COCHRAN—We are going to show that the pay lies upon a line extending from the northern portion of the claim to the southern portion of the claim; that during the period of this lease that pay was discovered in a well-defined paystreak adjoining this ground involved in this lease, right immediately adjoining it on the north, and extending in a well-defined paystreak through the southerly portion of the claim. The evidence will show that we would have started our prospecting where this pay was found, and that we would have then struck this pay had we been permitted to work, if they had complied with their contract, and would have de-

veloped the same paystreak that Mr. Anderson and Mr. Berger, laymen upon this ground, and would have derived the same profits because we expect to show that they had examined the ground before.

"MR. ORTON—We certainly object to the statement of counsel, because there is nothing in the record in this case for him to base such statements upon, and nothing whatsoever to show that Mr. Chilberg would have sunk his prospect shafts in the same place that Anderson and Berger did, or that he would have struck the same paystreak, or anything of the kind.

"THE COURT—It seems to me there might be two methods of proving what the damages could be in this case: One is to call witnesses to testify upon opinion simply as to what the value of this lease was, and the mode that the plaintiff has now adopted, that is of trying to ascertain what the plaintiff could have realized from the lease had the defendant not committed the breach——

"MR. COCHRAN—I agree with the Court except that I think the word 'would' is proper instead of the word 'could'.

"MR. ORTON—We shall object to this line of testimony upon the grounds before stated; that is, that it is incompetent, irrelevant and immaterial, and not a proper element of damages, and as incompetent evidence to prove the proper measure of damages in this case.

"THE COURT—Objection overruled; proceed.

"A. Yes, sir."

XIX.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question and other proceedings being as follows:

"Q. State to the jury, Mr. Anderson, how you worked this ground?

"MR. ORTON—Objected to as incompetent, irrelevant, and immaterial and not a proper element of damages and as calling for incompetent and irrelevant evidence on the question of the measure of damages.

"THE COURT—Objection overruled.

"A. Why, we sunk a shaft on the south half of the claim, and ran a drift, in that drift we stopped where we were on the north half, and connected the two, and then we put up a hoist on that sout' shaft and took out a dump there; that is we worked the two faces as one, connected them and worked them together so that we hoisted out of the two shafts."

XX.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, said question, and other proceedings being as follows:

"Q. (By MR. PACKWOOD)—Did you find the

pay in the first shaft you sunk on the south side of the ground, I mean?

"MR. ORTON—That is objected to as immaterial.

"THE COURT—Overruled.

"A. Well, I don't remember which shaft we got bedrock with first; we found, however, we found pay on the north half, in the shaft on the north half; in the shaft on the south half the pay was weak; we didn't hardly consider that it was pay there at the time we found it."

XXI.

The Court erred in overruling the objection of the defendant to the question asked the witness, Andy Anderson, which question and answer and the other proceedings being as follows:

"Q. Can you state about what you took out of the south dump, in value?

"MR. ORTON—That is objected to, if the Court please, as being irrelevant, incompetent and immaterial, and because it already appears from the evidence of this witness that the south dump was taken from both sides, the north and the south half of the claim, and that the dirt was commingled from the two sides and he certainly could not testify as to the value of the portion from the south half.

"THE COURT—Objection overruled.

"MR. ORTON—I would like also to add that Mr Kjelsberg had nothing whatsoever to do with the

commingling of the dirt in this dump, or that it was not in any way connected with this authority.

"THE COURT—Objection overruled.

"Q. Do you know anywheres near what was taken from the south dump, in value, Mr. Anderson?

"MR. ORTON—We make the same objection, that it is irrelevant, incompetent and immaterial, not the proper measure of damages, and because it already appears from this witness' testimony that the dirt in the south dump was commingled from the two sides of the claim, and therefore he could not testify as to the value of the portion taken from the south half.

"THE COURT—Objection overruled.

"A. I can't state accurate.

"Q. Well, about as near as you can state it?

"MR. ORTON—I desire to object to this question upon all the grounds as the last preceding question, to wit: Objected to on the grounds that it is irrelevant, incompetent and immaterial and not the proper measure of damage in this case, and upon the further grounds that the witness has just answered that he can not state with any degree of accuracy, that the dirt was commingled in the south dump from the two sides of the claim, and therefore any testimony he would give as to the value of the gold-dust taken from the south dump would be irrelevant, incompetent and immaterial in this case.

"THE COURT—Objection overruled.

"A. The nearest I can say, there was about in the south dump, the amount was somewheres between forty and forty-five thousand dollars."

XXII.

The Court erred, after the witness, Andy Anderson, had stated that he could state with reasonable certainty from his knowledge as a practical miner, and from pannings and prospects taken from that portion of the ground lying south of a line between the north half and the south half of the Metson Bench, the amount of gold and gold-dust that was taken from the southerly portion of the claim by him in his operations upon the ground during the winter of 1905-06, in overruling the objection of the defendant and permitting the witness to state the amount to be about twenty thousand dollars.

XXIII.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, to state what would be the reasonable and ordinary expense of extracting the pay-dirt and mining and sluicing it up in the ordinary method of mining in this district, the answer of the witness, Andy Anderson, being that it might cost thirty per cent. and would not be more than thirty-five per cent. in the manner in which he mined it.

XXIV.

The Court erred in overruling the objection of the defendant to the following question asked the witness, Andy Anderson, said question and other proceedings being as follows, to wit:

"Q. To get that clear before the jury I will ask you this question: You may state whether or not in your opinion and according to your best judgment, the south half of the Metson Bench produced more than twenty thousand dollars or less than twenty thousand dollars from your operations of that portion of the ground during the winter of 1905 and 1906?

"MR. ORTON—To which defendant objected on the ground that the question is irrelevant, incompetent, and immaterial, as not being a proper element of damage, and also in addition to all these objections we make the further objection which I understand your Honor has already ruled upon, the question has already been asked and answered.

"THE COURT—We overrule the objection.

"A. Well, I don't think—it might have been a little more, but it would not be much, and I don't think that it was less; I feel that it was not less."

XXV.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, to testify as to what ground lay immediately north of the

Metson Bench, also as to what other claim adjoined the Metson Bench on the north, and also in allowing and permitting the witness, Andy Anderson, over the objection of the defendant, to testify that this claim was a valuable claim.

XXVI.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, to state that there had been pay found on the Portland Bench at the time that plaintiff contends the defendant had given him the lease, and that the Portland Bench claim was a valuable claim.

XXVII.

The Court erred in permitting the witness, Andy Anderson, over the objection of the defendant, that he considered the Metson Bench a good place to prospect for gold at the time he entered into the lease for the north half of the Metson Bench.

XXVIII.

The Court erred in permitting the plaintiff when testifying in his own behalf to answer the following question over the objection of the defendant, the question, answer of the witness and other proceedings being as follows:

"Q. Where did you intend to sink a shaft had you worked the ground, under your lease?

"MR. ORTON—That is objected to as being irrelevant, incompetent and immaterial and not a proper basis on which to estimate damages, as being too uncertain.

"A. I was going to go about the middle line, anyway, I always had an idea that the pay was down in that direction on account of the Portland Bench being up on the one side, Kiowa Bench on the other."

XXIX.

The Court erred in permitting the plaintiff, Chilberg, when testifying in his own behalf, to answer the following question over the objection of the defendant, said question, and the other proceedings being as follows:

"Q. State whether or not, Mr. Chilberg, you had made up your mind where you would sink a hole upon this ground, had Mr. Kjelsberg complied with his agreement in regard to giving you a lease on the south half of it?

"MR. ORTON—Objected to as immaterial, because the witness has not yet shown that he had made up his mind to work it at all.

"THE COURT—Overruled.

"A. I had."

XXX.

The Court erred in permitting the plaintiff, Mr. Chilberg, when testifying in his own behalf, to answer the following question over the objection of the defendant, said question and other proceedings being as follows:

> "Q. Where did you intend to sink that hole with reference to the workings testified to by Mr. Anderson?
>
> "MR. ORTON—That is objected to as being irrelevant, incompetent, immaterial and as having no bearing upon the question of damages, particularly as the workings of Mr. Anderson were upon another part of the claim.
>
> "THE COURT—Objection overruled.
>
> "A. Well, I had thought—I had made up my mind to work on that on the south—or on the south half rather, in the southeast corner—"

XXXI.

The Court erred in permitting the plaintiff, when testifying in his own behalf, to answer the following question over the objection of the defendant, said question and the other proceedings being as follows:

> "Q. If there had been any *point* at the point where you intended to prospect this ground would you have discovered that pay if you had worked your lease?

"MR. ORTON—Now, if the Court please, that is objected to as incompetent, irrelevant and as calling for a conclusion of the witness.

"MR. PACKWOOD—I desire to hand this exhibit to the witness, if the Court please.

"MR. ORTON—No, your Honor, I object to this exhibit being shown to the witness, if the Court please, for him to testify that he would have sunk a shaft in exactly the same place where it is shown upon this plat that Anderson and Berger sunk their shaft in which they discovered their pay. We think he should testify first to the point where he intended to sink his shaft, if at all, without his being permitted to take this exhibit and pick out the identical spot from it, where by the workings of these other men the pay was located.

"MR. PACKWOOD—I think we are entitled to hand this plat to the witness for the purpose of getting his testimony clearly before the jury.

"THE COURT—We permit the exhibit to be shown to the witness.

"MR. ORTON—We save an exception, if your Honor please, to the Court's ruling that it may be shown to the witness over the objections of the defendant, as highly prejudicial to the rights of the fendant.

"A. Well, I think I would, yes."

XXXII.

The Court erred in permitting the plaintiff, when testifying in his own behalf, to answer the following question over the objection of the defendant, said question and the other proceedings being as follows:

"Q. After you discovered the pay could you have taken it out?

"MR. ORTON—That is objected to as being incompetent, irrelevant and immaterial, and calling for the conclusion of the witness and further because it has not been shown in the evidence in his testimony that there was any pay where he said he was intending to prospect.

"THE COURT—Objection overruled.

"Q. And would you have done so?

"MR. ORTON—We make the same objection, that it is incompetent, irrelevant and immaterial, and it is not a proper measure of damages, and as not being the measure of damages as alleged in the complaint.

"THE COURT—Objection overruled.

"A. I certainly would."

XXXIII.

The Court erred in permitting the plaintiff, when testifying in his own behalf, over the objection of the defendant, to answer the following question, said question and other proceedings being as follows:

"Q. (By MR. PACKWOOD)—(Witness is handed

Defendant's Exhibit 'A' and asked.) State if there had been any pay within the boundaries marked on that paper as having been worked out between the double lines there on with the letter x x x, if you had been permitted to work your lease, if you would have discovered that pay?

"MR. ORTON—That is objected to as calling for the conclusion of the witness, asking merely and solely for a prophecy upon his part, as to what he would have done, and as being a question which is impossible for any one to answer.

"THE COURT—Objection overruled.

"A. Well, as I stated before, it was my intention to work that portion of the claim, and I don't see how I could miss the paystreak there.

"MR. ORTON—Now, I move to strike that out as not responsive to the question.

"THE COURT—Motion overruled."

XXXIV.

The Court erred in permitting the plaintiff when testifying in his own behalf, over the objection of the defendant, to answer the following question, said question and the other proceedings being as follows:

"Q. Now, Mr. Chilberg, you may state whether or not if Mr. Anderson or any one else had sunk a shaft or hole, during the winter of 1905—or during the months of October, November or December, 1905, at that point marked 'B' there, and had discovered pay there in that hole, that if from that

circumstance and that fact, you would have been able to locate the pay on the south half of the Metson Bench.

"MR. ORTON—That is objected to as being irrelevant, incompetent and immaterial, and calling for the conclusion of the witness, the reason that one person had discovered pay on one end of a claim, or on an adjoining claim, across the line and at a considerable distance from it, and also a hole having been sunk after the time of the alleged breach was committed, on the self same ground, namely by the lessee, Mr. Berger, of the self same ground, is certainly wholly incompetent, irrelevant and immaterial, and not proper in this case, and as calling for a conclusion, wholly, from the witness.

"THE COURT—Objection overruled.

"A. Well, it certainly would be very easy then to find the paystreak, under those circumstances, if I knew them, certainly."

XXXV.

The Court erred in permitting the plaintiff when testifying in his own behalf, over the objection of the defendant, to answer the following question, said question and the other proceedings being as follows:

"Q. Would you have found the paystreak under that state of facts?

"MR. ORTON—Same objection.

"THE COURT—Objection overruled.

"MR. ORTON—It simply calls for the conclusion

of the witness. That might be proper for the jury to determine from all the evidence submitted to them.

"THE COURT—Well, he has testified to matters within his own consciousness—I don't see how he can be deprived of testifying to his opinion upon that subject.

"MR. ORTON—The further objection to the question is, that those shafts referred to were sunk at a time on the premises adjoining after the time when the alleged breach of this contract of a mining lease was committed upon the self same ground, by the same Mr. Berger, who held the lease for the same ground for the same period.

"THE COURT—Objection overruled.

"Q. Under the state of facts, that a shaft had been sunk right here at the point marked 'B' on this exhibit, and pay found, would you then have found the paystreak, had you been permitted to work this ground under your lease?

"Q. Well, yes, I think I would."

XXXVI.

The Court erred in permitting the plaintiff when testifying in his own behalf, to answer the following question over the objection of the defendant, said question and other proceedings being as follows:

"Q. Well, I will just adopt the Court's question. If you had followed out the plan which you already have stated in regard to mining the Metson

Bench under the lease which had been promised you by Mr. Kjelsberg, would you have discovered pay?

"MR. ORTON—Same objection, that the question is too speculative and uncertain, and is incompetent, irrelevant and immaterial, and as calling for a conclusion of the witness.

"THE COURT—Objection overruled.

"A. This is the xx here. (Referring to Ex. 'A'.) This is on the south half of the claim, is it?

"Q. Well, I say *you* would have discovered pay there under these circumstances?

"MR. ORTON—I make all the same objections as to the last two preceding questions.

"THE COURT—Overruled.

"A. I think I would; I don't see how I could have missed it."

XXXVII.

The Court erred in permitting the plaintiff when testifying in his own behalf to answer the following question over the objection of the defendant, said question and the other proceedings being as follows:

"Q. If you found the pay upon the ground, Mr. Chilberg, how did you contemplate working upon the ground?

"MR. ORTON—Objected to for all the reasons before stated, together with the further objection that it is too speculative, being based upon something

which is too speculative, that is, the question of whether or not he found the pay.

"THE COURT—Objection overruled.

"A. Well, it depended on the pay I found how I would work it. I would probably use a windlass to prospect, until I found pay, and then put up a hoist, undoubtedly; that was my intention."

XXXVIII.

The Court erred in sustaining the objection to the question asked the witness, Jacob Berger, by defendant's attorney, said question and other proceedings being as follows:

"Q. Now, Mr. Berger, at the time you obtained your lease and went to work out there under it, state whether or not a lease, being a lease of forty per cent. to the owner and sixty per cent. to yourself was of any substantial value?

"MR. COCHRAN—That is objected to as being irrelevant, incompetent and immaterial, and not a proper measure of damage in this case."

XXXIX.

The Court erred in sustaining the objection to the question asked the witness, Jacob Berger, by defendant's attorney, said question and other proceedings being as follows:

"Q. Mr. Berger, I will ask you to state whether or not a lease under terms such as you have stated

that you had, that is, forty per cent. to the owner and sixty per cent. to the lessee, on ground such as the Metson Bench, on which pay had not yet been discovered, was of any value other than a speculative value?

"MR. COCHRAN—Objected to as being irrelevant, incompetent and immaterial for any purpose, and not a proper measure of damage in this case.

"THE COURT—Objection sustained."

XL.

The Court erred in sustaining the objection to the question asked the witness, Jacob Berger, by defendant's attorney, said question and other proceedings being as follows:

"Q. Mr. Berger, I will ask you if you can state whether or not a lease of the character which you had at that time, of the terms of which I have just enumerated, was at that time of any value?

"MR. COCHRAN—That is objected to, if the Court please, on the grounds that it is wholly irrelevant, incompetent, and immaterial for any purpose, and not a proper measure of damage in this case.

"THE COURT—Objection sustained."

ARGUMENT.

The points upon which we base this appeal are, first, the assumption of proof of a contract as alleged in the complaint, which assumption entered into the instructions to the jury; and secondly, the adoption of the wrong measure of damages, which error entered into the introduction of evidence and the charge to the jury. We have assigned a large number of errors, but most of them are closely interrelated and a decision upon some will control most of the others.

While the complainant has attempted to disguise the real nature of his action by asking damages for an alleged breach of an oral contract of dissolution of partnership, the record resolves the action into one for damages for breach of an alleged agreement to lease the said Metson Bench. There is nothing in the record to show that anything further is sought than damages for a failuse to make such a lease to Chilberg.

We therefore submit:

I.

Taking the testimony as offered by plaintiff, there is absolutely no contract proven by the record, which would entitle plaintiff to damages for its breach. The evidence of Chilberg as to this lease in no case would entitle him to a verdict for damages for its breach, admitting either that there was an oral lease, or that there was an agreement to make a lease in writing.

The testimony of Chilberg in either event should have prevented his recovery in law, as the record shows inconsistencies and contradictory statements upon his part that stamp his evidence as inherently improbable.

As his is the only testimony bearing on the point of failure to make the lease, save possibly the statement of Eugene Chilberg that he had been promised a lease but that no instructions were left with him to make one, there is but one of two conclusions to be drawn therefrom. Either he had an oral lease which he failed to take advantage of and lost whatever rights he had thereunder by his neglect to go out and work the ground during its term; or the parties never having reduced the terms of the contract of lease to writing there was no contract and there could be no breach of that which had no existence.

He testified on cross-examination that he knew an oral lease on the terms proposed was good for a year (Tr., 34), but the reason he was anxious to get the lease in writing was to have some *evidence of it* (Tr., 36). Afterwards realizing the import that might be placed upon such a statement in view of his subsequent failure to act upon the oral lease in any manner, and doubtless after consultation with his counsel, the witness attempted to explain by saying that he did not mean to say that he had an oral lease, but that Mr. Kjelsberg was to give him a lease (Tr., 87). In other words, that the lease or contract was to be in writing.

No comment need be made upon the effect of the failure of Chilberg to take any action during the term of the lease, or until the subsequent lessees had realized on the ground, assuming the lease was an oral one. He certainly could not hope to realize damages for his own neglect on such a state of facts, even if, as he says, he only wanted the written instrument as evidence of his rights. But take the other aspect presented by the record—negotiations looking toward the making of a lease which was to be in writing. If we are to believe that in this respect the plaintiff speaks the truth, there was no such an agreement to make a lease shown by the record upon which he could hope to recover, nor could there be any breach until such an agreement had been reduced to writing.

The precise terms of the lease had not been agreed upon. It was to cover the south half of the Metson Bench, according to Chilberg and was to carry a royalty of 40 per cent to Kjelsberg, to cover the winter of 1905 and 1906, ending some time in June; but on just what date in June it was to end the plaintiff did not know (Tr., 34), nor was the date set when it was to commence (Tr., 38).

It is evident that there was no settled agreement upon which the plaintiff would have a right to sue. The plan of the contract was incomplete and provisional upon the drawing of the lease and a failure to agree upon the details rendered all the preliminaries of no effect.

"If there had been no absolute agreement made as to all the particulars of the lease that was to be given—if the minds of the parties had not met as to all these particulars—there was no agreement on which an action would lie. Unless the lease in all its terms was agreed upon then there was no binding contract that could be enforced in law. *If any of the conditions to be contained in the lease were left indefinite and to be fixed only when the lease should be prepared, there was no such contract as was binding on the parties at law; whatever may have been the probability that the parties would not ultimately disagree upon the form of the lease, or however unimportant to the lease the stipulation omitted to be specified might be regarded.*"
(Italics ours.)

Sourwine vs. *Truscott,* 17 Hun., 432, 434.

It is clear that Chilberg did not expect to be bound until the lease was in writing. Accepting all of the plaintiff's testimony as true, Kjelsberg also did not intend to be bound until the lease was "fixed up."

There is also another principle of law applicable on this point. Conceding that all details of the contract had been agreed upon, the fact that the understanding was that there was to be nothing binding until these details were reduced to writing, then the law enters in and says "there is no contract until the writing is drawn up and subscribed to by both parties."

Clark on Contracts, p. 62.

"If though fully agreed on the terms of their contract the parties do not intend to be bound until a formal contract is prepared and signed *there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence that they did not intend the previous negotiations to amount to an agreement.*"

Id., p. 38.

The case of *Law* vs. *Pemberton,* 31 N. Y. S. (1894), 21, is very much in point, where it was held that:

"An action for breach of an agreement for a lease can not be supported unless the lease in all its terms was agreed npon, and nothing left indefinite to be fixed only when the lease should be prepared."

And the Court in that case, in line with the second point we have above suggested, says further:

"Nay more: *'If the parties agree upon the terms, however precise, subject to the preparation and approval of a formal contract,* the concurrence of their wills is suspended, and where nothing further is done, *there is no contract.' Bish. Contracts,* Sec. 319." (Italics ours.)

II.

The Court erred in giving to the jury the following instruction:

> "You are instructed in this case to find for the plaintiff for some amount."

(Specification of Error VII.)

Such instruction was error in that it assumed the existence of a controverted fact, *i. e.,* the making of the contract in dispute, and its breach on the part of Kjelsberg and that damages had ensued to the plaintiff.

Any assumption of facts in dispute which must be determined by the jury is an infringement of their province and such assumption is error.

Hughes on Instructions to Juries, Sec. 192.

In the case of *Small* vs. *Brainard,* 44 Ill., 355 (an action of trespass), an instruction to the jury that the plaintiff was "entitled to recover all damages proved to "have been sustained by him on account of the tres- "passes committed by the defendant on the plaintiff's "premises, as alleged in the declaration," was held to be erroneous and the judgment reversed, because it assumed the defendant committed the trespasses and that the only question before the jury was the amount of damages.

Yet, following on the heels of such statement, the Court below gives the instruction complained of, "to *find for the plaintiff in some amount.*"

We are, of course, familiar with the rule of law that where there is an infringement of a legal right by the breach of a contract, even in the absence of any actual damage being shown, still the party whose right has been infringed would be entitled to nominal damages. But that is not the situation here. There is no admission of the contract or of its breach on the part of the defendant. On the contrary, there is an express denial. Whether the evidence showed such a contract as alleged by plaintiff and a breach thereof by defendant was for the jury, and an instruction that they must find for the plaintiff in *some amount* was error, in that it took from the jury the decision of the question of either the existence of the contract as alleged or its breach by the defendant.

Such a charge was liable to be and doubtless was construed by the jury as assuming the proof of the material facts in issue, and was misleading and erroneous.

Railway Co. vs. *Williams,* 40 S. W., 161;
Frasier vs. *Charleston & W. P. Ry. Co.,* 52 S. E., 904;
Gulf, etc., R. Co. vs. *Botte,* 94 S. W., 345;
Palmer vs. *McMaster,* 25 Pac., 1057;

Gallick vs. *Bordeaux,* 78 Pac., 583;
Texas Cent. R. Co. vs. *Waldie,* 101 S. W., 517;
Brougham vs. *Paul,* 138 Ill. App., 455.

III.

The Court further erred in giving to the jury the following instructions, to wit:

> "That the rule of law is that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement to lease he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain."

And:

> "So far as money can do it, the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased."

(Specifications of Error I and II.)

Neither of said instructions states the correct rule of law, in that both assume a measure of damages that is

not applicable to the facts of this case, and is in direct opposition to the rule laid down by *Jones on Landlord and Tenant,* Sec. 140, where that well-known author says:

> "When an owner of premises refuses to carry out his agreement to grant a leasehold estate and the other contracting party resorts to an action at law to recover compensation for the loss entailed, by the breach of contract, *the measure of damages is the value of the contemplated leasehold estate in the open market minus the rent reserved.*" (Italics ours.)

See to this effect:

North Chicago St. R. R. Co. vs. *Le Grand Co.,* 95 Ill. App., 465;
Graves vs. *Brownson,* 120 S. W., 563;
Green vs. *Williams,* 45 Ill., 206, 208;
Cilley vs. *Hawkins,* 48 Id., 308;
Lloyd vs. *Capps* (Tex.), 29 S. W., 505;
Newbrough vs. *Walker* (Va.), 56 Am. Dec., 127;
Giles vs. *O'Toole,* IV Barb., 261;
Rhodes vs. *Baird,* 16 Oh. State, 573;
Kenny vs. *Collier,* 8 S. E. (Ga.), 59;
Eastman vs. *Mayor, etc., of City of New York,* 46 N. E., 841;

Wells vs. *Abernethy,* 5 Conn., 227;
Schultz vs. *Brenner,* 53 N. Y. S., 972;
Dodds vs. *Hakes,* 21 N. E., 398.

The case of *Cilley* vs. *Hawkins, supra,* was a suit for a breach of contract to lease lands, and there the Court say:

> "In such a case *the true inquiry is as to the value of the lease at the time the breach occurred.* Such terms necessarily have a present market value like other estates and interests in real estate, and the inquiry should have been, what was its true worth? for how much could plaintiff in error have sold it to any one desiring to purchase? *Not how much any person might imagine could have been made by its enjoyment.*" (Italics ours.)

In the case of *Birch* vs. *Wood,* 111 Ill. App. (1903), p. 336, the principle of *Cilley* vs. *Hawkins* was affirmed by the Illinois Appellate Court in reversing the judgment of the lower Court for error in not following such rule, the Court saying:

> "The trial judge proceeded upon the theory that the measure of damages in the event of a breach of the covenants of the lease, which is not denied, *might recover whatever damages accrued to the plaintiff as a result thereof.* The only special damages alleged are $25. . . . It follows that of the $600 verdict the jury must have assessed $575 as direct damages for appellant's failure to put ap-

pellee in possession of the premises. The Supreme Court, in considering the correct rule as to the measure of damages in a similar case, in *Cilley* vs. *Hawkins,* 48 Ill., 308, said (quoting the language above referred to): '. . . . *Applying the principle of the foregoing rule to this case necessitates a reversal of the judgment. There is no evidence in the record tending to show the value of the leasehold estate.*'" (Italics ours.)

In the case at bar general damages only is asked.

If, as we contend, the foregoing decisions state the true rule of law, the Court below further erred (Specifications of Error 37, 38 and 39; Tr., 89), when it sustained objections to the questions propounded to Mr. Berger relative to the value of his lease at the time defendant gave him said lease. This lease was of the same character, covered the same period of time, the same property, was upon the same terms as the alleged lease to Chilberg, and was the practical embodiment of the breach of the alleged agreement to lease to Chilberg. Defendant sought to show by said Berger what the value, if any, of said lease was at that time, in line with the principle of law enunciated above, that the value of the lease at the time of its breach was the measure of plaintiff's damage to be submitted to the jury.

This testimony was competent, and defendant should have been permitted to show thereby, so far as possible,

the true value of the lease in question in the market at the time the breach occurred.

For the same reasons, the Court should have instructed the jury in line with the request of defendant embodied in Specification of Error IX, that the measure of damages was the value of the lease claimed by him at the time when the defendant breached the contract. The refusal of the Court to permit the defendant to show the value of such lease at the time of the breach, and to instruct along the lines suggested constitutes reversible error, as by reason of the Court's action there was nothing in the record tending to show the value of the leasehold estate at such time. *Birch* vs. *Wood, supra.*

IV.

The Court erred in instructing the jury along the lines embraced in Specifications of Error III, IV and V, as follows:

> III. "Proof of the profits may be made by showing what profits were made under a like lease by other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in the same manner as the persons who had worked the same."

> IV. "The Court instructs the jury that if you find from the evidence that pay dirt and gravel has been mined from said premises agreed to be leased

to the plaintiff (if you find such an agreement existed), by other lessees of the defendant during the period of time for which plaintiff was to have a lease thereon; and you further find with probable certainty that the plaintiff, if he had been permitted to work said lease agreed upon would have discovered said pay dirt and gravel, and would have worked and mined the same at a profit, you will find for the plaintiff, and in that case his measure of damages is that profit, if any, which would have been derived during the term of the lease agreed upon between the defendant and plaintiff, if any such agreement existed, after first deducting the royalty agreed upon and reasonable costs of mining and extracting the values from said pay dirt and gravel."

V. "And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form somewhat more concrete, that if they find from the evidence that the defendant, during the fall of 1905, entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, District of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another cov-

ering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profits which you shall find from the evidence he would have made if the lease agreed upon had been fully performed by him."

Specifications of Error III, IV and V (Tr., 107-8).

As these instructions embody the same erroneous propositions of law, we shall discuss them together.

These instructions are in line with the whole erroneous theory upon which the case was tried, that plaintiff was entitled to recover whatever *profits* he might have made if he had a lease on the ground in controversy, and that those profits were to be considered by the jury in the light of profits made by third parties working *not* the property in controversy *alone,* but conjointly with others working on the other half of the claim.

These instructions are erroneous in that they allow the jury to consider:

(a) Profits that were remote, speculative and contingent, as an element of damages in the case.

(b) Profits that *might have been made* in an entirely new and unknown venture.

(c) Said instructions assumed a state of facts not shown by the record.

Along the lines of these instructions, and against the objections of defendant, plaintiff was permitted to show what profits were made on the Metson Bench as an entirety, by Andy Anderson, who was the lessee of the northern half thereof, and Berger, who had the lease of the south half, and what Anderson conjectured was made out of the south half as a matter of profit.

The record shows that Anderson and Berger decided that it would be more economical and productive of better results if they worked the two halves jointly, and Anderson testified that the fact that he had an outfit on the ground and had the ground partly opened up was a material factor in considering the question of the profits that might be made out of the south half (Tr., 60).

Relative to this question of profits from the south half, he testified that

> "If we had had no other ground to work excepting that part of the south side, I don't think I would know how much it would cost to take the pay out. It depends on how long a man was locating pay on it. If you had no other ground it might cost more" (Tr., 61).

Yet the Court below instructed the jury that "proof "of the profits may be made by showing what profits

" were made under a like lease by other parties *if the* " *proof further shows that party who was to have the* " *lease would have worked the premises practically in* " *the same manner as the persons* who had worked the " same."

It is evident the Court had in mind the working of the ground by both Anderson and Berger together, by the use of the plural. It is clearly evident therefore that the Court did not make the distinction between profits made by persons working the south half of the ground in dispute and a combination which worked the two halves as a whole. Admitting for argumentative purposes that such an instruction would be proper in a record which showed the profits arising from the independent working of the south half alone, as no such facts appear, it is natural to assume that the jury, in line with the Court, also failed to make the distinction suggested; that they based their verdict upon a condition of facts that would render it necessary to assume that just such a state of combined efforts on the part of *Chilberg* and Anderson would have taken place if the former had obtained the lease instead of Berger, and that the results would have been the same, a highly speculative and problematic assumption.

Such instruction was further necessarily misleading, for it conveyed to the minds of the jury the impression that profits realized by a third person out of a leasehold interest were elements to be considered in estimating

profits that might have been made by the party deprived of the leasehold interest.

In the case of *Smith* vs. *Eubanks,* 72 Ga., 280, where in an action for breach of the terms of a lease, the Supreme Court of Georgia in holding error, the charge of the lower Court that any evidence of damages traceable to the breach of contract from profits afterwards made by parties occupying the premises might be considered by them as the basis of their calculations in finding damages, said:

> "This charge is error. *What other parties in possession made afterwards is no basis for recovery by plaintiffs.* The successors of plaintiff may have been more popular and thus have made customers. They may have managed better, and made more money. They may have been men of better habits, more prudent and successful business men, *more accustomed to this sort of business, and in these and many other ways the business may have been more profitable with them than in the hands of the plaintiff. Therefore, to base plaintiff's prospective profit on their success would be far from a just rule by which to measure damages sustained by them for their eviction. . . . to make the profits of successors the measure of how much plaintiffs could have made if not evicted, and thus the measure of their damages would not be in accordance with law or reason."*

See also:

> *Dennery* vs. *Bisa,* 6 La. Ann., 365.

Does not the same reasoning apply here, only more strongly? There is nothing in the record to show that Chilberg ever had been on this ground at the time of the alleged breach of the promise to lease; nothing to show that he possessed the personal qualities and ability to mine the same to an advantage, nothing to show that he had ever had any experience as a miner. Although testifying that he was a miner, the record, on the contrary, shows him as the keeper of a saloon, while it is uncontradicted that both Anderson and Berger were men skilled in mining, and evidently with that quality of the miner, so necessary to a successful venture in that most speculative and uncertain of businesses, a keen insight into the ground, a dogged persistence and diligence that ultimately brings with it, but not always, the reward sought, a paying mine. But, at the outset, under the circumstances shown here, there can be nothing more than a hope of benefit from an uncertain venture. A hope that in this instance failed both Berger and Anderson at times, for the latter says:

> "When I took hold of it (the north half) I thought it was a pretty good opportunity of finding something. I had the privilege of taking any part I wanted of the claim and I took the north half. At that time I would not have considered the south half at 40 per cent royalty a very good proposition. . . . The south half was a good deal more uncertain than the north half, because I had found indications of small pay up there on the

ground adjoining it on the north about 150 feet from the corner. . . . I was uncertain where the pay went, but it was my opinion that the third beach line did not go through the Metson Bench, and I know now that the third beach pay did not go through the Metson. Mr. Berger and I went into partnership in November I think, might have been in December. . . . *We didn't get into that piece of pay on the south part until the middle of March. The best indications were on the north side and as we went into the south, the pay got poorer, it only went from three to six cents at its lower end. Mr. Berger and I were considering at one time of abandoning our workings on account of the pay we were getting in the first shaft we sunk on the Metson Bench"* (Tr., 62, 63).

This first shaft was on the south half (Tr., 66; Point "A" on Defendant's Ex. A, Tr., 64). And it was not until four or nearly five months had elapsed, that any pay was discovered on the south half of the claim. And as Berger testified, he prospected diligently the entire southerly portion, saying as a result of this work that "if he had had only a lease upon the "southerly half of this claim and had operated the "southerly portion of it and found the block of pay "which he took out and worked it in an economical "manner, he would have made a 'stand-off,' *that he "might have made a very small profit and there might "have been a very small loss"* (Tr., 91).

Upon such a condition of facts, upon such prob-

lematic speculative prospects, without a showing of any equipment personally to meet the requirement of such an undertaking and without any consideration of the personal equation which necessarily must and does enter into a venture of this character, the Court instructs that proof of the profits may be made by showing what profits were made by other parties, *if* the proof further showed that the party who was to have the lease *would have worked the premises in practically the same manner.*

We are not unmindful of the fact that evidence of profits *per se* is not always inadmissible, but we contend that evidence of such profits only is admissible where the profits are readily estimated and are not open to the objections of uncertainty or remoteness, or dependent upon contingencies that might never arise.

In an oil and gas lease which bound the lessee to drill a well on the property to a certain depth within a specified time, damages for breach of such provision were by this Court held necessarily indefinite, uncertain and speculative, and for that reason the parties were entitled to fix an amount of such damages by mutual agreement.

Blodgett vs. *Columbia Live Stock Co.,* 164 Fed., 305.

It is matter of common knowledge that money, energy, skill and labor are required to develop mining

lands. There is no property or venture that is more uncertain in its character.

> "Today the indications are full of promise; to-morrow they are as full of discouragement. The mine which to-day may be deserted, and out of consideration, or which being worked produces small results, may in a few years *by persistent energy and the expenditure of money,* turn out to be vastly productive and valuable."
>
> *Kinne* vs. *Webb,* 49 Fed., 516.

This was as certainly true of the ground in controversy as of any other mining ground. It appears from the record that when the breach of this alleged agreement to lease occurred, no pay had been discovered on this ground, nor had it been shown to contain any values. It was not until after working a month that some pay was discovered on the north half (Tr., 47), and nearly five months had elapsed before the pay was discovered on the south half (Tr., 63). And this only as the result of the continuous efforts of Anderson and Berger, and the men in their employ, some fifteen in number (Tr., 92).

But the Court nevertheless instructs the jury to consider, and allowed evidence of profits made as a result of this joint enterprise carried on on both the *north* and *south* halves of the claim under two different leases; the resulting condition being the outcome of the combined

efforts, energy, skill, money and diligent labor of both Anderson and Berger and their employees. And this as a factor to determine Chilberg's possible individual profits out of a lease covering the south half of the claim only, and which he might or might not work at the points where Berger and Anderson discovered some pay, with nothing to show that he was in a position to employ the men, or use the machinery necessary to diligently prospect the mining ground to a successful outcome during the period of his lease.

After Anderson and Berger *had worked* five months on the ground and as a result of their diligence, skill and money *had demonstrated its value,* and after being shown a map outlining the positions of the shafts on the ground worked by Berger and Anderson, it was certainly a simple matter for Chilberg to assert that the portion of the ground covered by such shaft was just the point where he would have sunk his shaft if he had been given an opportunity to do so; and that he would have worked the ground in the same way, and done exactly as they did. No other testimony was to be expected under the circumstances. But for the Court to instruct along the lines complained of and to permit the evidence objected to, is not, we submit, in the language of the Court in *Smith* vs. *Eubanks, supra,* "in accordance with law or reason."

In the case of *City of Chicago* vs. *Henerheim,* 85 Ill., 594, where land had been wrongfully overflowed, so as to deprive the owner of its use, evidence was permitted

to be introduced showing what might have been raised on the same if it had been cultivated, less the cost of cultivation and marketing. In holding the allowance of such evidence error, the Supreme Court of Illinois say:

> "The rule for the assessment of damages was wrong. In cases of this character the true measure is the fair rental value of the ground which was overflowed *and not the possible or even the probable profits* that might have been made *had the land not been overflowed.* Such damages are too remote and speculative, depending on too large a variety of contingencies which might never have happened."

In the case of *Dodds* vs. *Hokes,* 21 N. E., 398, where the question of damages for the failure of defendant to give the possession of a store to the plaintiff, leased by the latter, was submitted to arbitrators, and they made an allowance for losses suffered by the plaintiff by being thrown out of business, such allowance was held to vitiate the entire award. The Court of Appeals relative to such action saying:

> "We think the loss of business which plaintiff might have sustained from being deprived of the opportunity to occupy the store in question was not within the terms of the submission. *The rule in all cases where damages are claimed solely from the failure of the lessor to give the lessee possession of the leased property is well settled, and limits the*

plaintiff's recovery to an amount represented by the excess of the actual rental value over the rent reserved in the lease."

In the case of *Rhodes* vs. *Baird,* 16 Ohio State, 573, it was sought to show what the probable profits to the plaintiff of a peach orchard would be if the contract to lease had not been breached. The Supreme Court of Ohio, in holding such evidence inadmissible, said:

"It is a well-established rule that the damages to be recovered for a breach of a contract *must be shown with certainty and not left to speculation or conjecture.* In the practical application of this general rule, others have been adopted as guides in ascertaining the required certainty; as (1) that the damage must flow naturally and directly from the breach of the contract, that is, must be such as might be presumed to follow its violation; and (2) must be not the remote but proximate consequence of such breach. . . . In the present case, as respects the property, the immediate or proximate consequence of the breach of the contract, by the eviction, was the loss of the use of the premises for the term, *to the extent that the damages depended on the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract, on the part of the plaintiff furnished the standard for assessing the damages;*

"If it had no general market value, its value should have been ascertained from witnesses whose skill and experience enabled them to testify directly

to such value in view of the hazards and chances of the business to which the land was to be devoted.

"This would only be applying the same principle for ascertaining the value of property which by reason of its limited use, had no general market value, which is adopted with reference to proving the present worth of the future use of property which by reason of its being in greater demand has such market value. . . . *But in either case, the proving the value of the property by witnesses having competent knowledge of the subject is more certain and direct than to undertake to do so by submitting to the jury, as the grounds on which to make up their verdict the supposed future profits.*"

Exactly what the Court below *refused* to permit to be done here. The Court *refused* to allow us to show by Berger, a skilled miner, competent to testify on the subject what was the value of this leasehold interest at the time of its breach and effectually cut off thereby the possibility of defendant getting before the jury the true measure of damages controlling in the case. Specifications of Error XXXVII, XXXVIII and XXXIX.

In this connection, we beg to call the attention of the Court to that other principle of law, that profits expected to be enjoyed from a prospective business venture can not be considered as an element of damages, where such business is literally a new venture on an unknown sea, whether commercial, mining or otherwise.

This principle is nowhere more clearly put than is its enunciation by Judge Sanborn in the case of *Central Coke Co.* vs. *Hartman,* 111 Fed., 96. There he says:

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. *Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable.* The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. *Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. Howard* vs. *Manufacturing Co.,* 139 U. S., 199, 206, 11 Sup. Ct., 500, 35 L. Ed., 147; *Cincinnati Siemens-Lungren Gas Illuminating Co.,* vs. *Western Siemens-Lungren Co.,* 152 U. S., 200, 205, 14

Sup. Ct., 523, 38 L. Ed., 411; *Trust Co.* vs. *Clark,* 92 Fed., 293, 296, 298, 34 C. C. A., 354, 357, 359; *Simmer* vs. *City of St. Paul,* 23 Minn., 408, 410; *Griffin* vs. *Colver,* 16 N. Y., 489, 491, 69 Am. Dec., 718. . . . *He who is prevented from embarking in a new business can recover no profits,* because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced."

"That anticipated profits from a business intended to be carried on by the plaintiff upon the premises *can not be allowed* is as well settled as anything can be in an age of legal scepticism."

Kenny vs. *Collier,* 79 Ga., 746-7.

"When a party being about to embark in a new business is wrongfully prevented by another, he can not recover expected profits, for there is nothing to prove that such profits would have been made."

Consumers' Pure Ice Co. vs. *Jenkins,* 58 Ill. App., 519, 525.

See also on this point:

Sedgwick on Damages, Sec. 183;

And:

Hodges vs. *Fries,* 15 So., 682, 685;
Green vs. *Williams,* 45 Ill., 206;
Giles vs. *O'Toole,* IV Barb., 261.

In all these cases damages were asked for profits which might have been made in a mercantile business, but which were denied on the ground that they were too remote and speculative and dependent upon too many contingencies. What more speculative, remote or problematic profits can be considered than those that are contingent upon the working of a piece of virgin ground, believed to contain minerals in its depths? A belief founded on no probabilities, but which if followed up by prospecting is likely to bring forth naught but disappointment to the prospector or, one chance in ten, may result in a paying mine? There was nothing to indicate that there was any more possibility of this piece of ground turning out a valuable prospect, than that of hundreds of other similar pieces located in and about the same mining district. And the fact that Anderson and Berger working together on both halves of the claim discovered pay, would not argue that if Chilberg had gone on the ground he would have done likewise during the term of his lease. The history of mining districts is full of claims worked apparently to the limit by one miner and abandoned as of no value, and yet when taken hold of by new people with the investment of new capital, labor and machinery, the result is a valuable mine. It would seem that in no class of business would the principle of denying the application of prospective profits as a measure of damages be more

urgent than in the character of cases similar to the one at bar.

We therefore submit that the Court seriously erred when it permitted the plaintiff to testify as to what he *intended* to do towards prospecting the claim, and where he *intended* to sink a shaft, and especially in permitting the witness to be shown the plat of the ground showing where the subsequent lessees had worked and discovered pay, preliminary to his testifying as to where he intended to sink his shaft (Specifications of Error XXVIII, XXIX, XXX, XXXI and XXXII). And further erred in permitting the witness to testify that if Mr. Anderson or anyone else had sunk a hole during the winter months of 1905, at the point marked "B" on the map, and had discovered pay, that from that circumstance he would have also been able to locate the pay on the south half; and to further testify that how *if* he found pay on the ground he would work the same. And to testify further that *if* he followed out his plan in rgard to mining the Metson Bench, he would have discovered the pay (Specifications of Error XXXIII, XXXIV, XXXV and XXXVI).

These questions all called for the conclusions of the witness relative to a purely problematical situation. His conjectures and opinions as to what his conduct might have been, or would be, based upon conditions arising *after* the breach of the alleged agreement to

lease had occurred, were entirely incompetent to prove what his damage *was* by the failure of defendant to give him a lease. His damage, if any, must be based upon the conditions existing at the time of the breach.

In prospecting this ground he might have encountered difficulties and have suffered loss. Berger testified that he would have suffered loss possibly if he had not worked in common with Anderson. The venture of which plaintiff was deprived, if any, was not a loss in the direct sense of the term, but a deprivation possibly of what might have been an opportunity to make money, but one purely speculative in its character and dependent entirely upon the amount of diligence, money and knowledge of mining conditions he brought to the work whether such venture would be a successful one.

It is assumed that the jury, in assessing damages, follows the measure of such damages laid down in the charge of the Court.

Such measure, as charged herein, was "the profits "which you shall find from the evidence the plaintiff "would have made if the lease agreed upon had been "fully performed by him."

A verdict founded upon such a measure of damages and upon incompetent testimony is neither based upon law or facts. We submit that the judgment herein is

highly prejudicial to the rights of the defendant for the reasons stated, and should be reversed.

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.....,

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E. H. RYAN,

Of Counsel.

No. 1716

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

MAGNUS KJELSBERG,
Plaintiff in Error,
vs.
B. A. CHILBERG,
Defendant in Error.

Brief of Defendant in Error.

ALBERT H. ELLIOT,
WM. H. PACKWOOD,
Attorneys for Defendant in Error.

Filed this.....day of October, 1909.

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Statement of the Case.

The defendant in error (plaintiff below), brought suit against plaintiff in error (defendant below), for recovery of damages alleged to have resulted to defendant in error, because of the breach by plaintiff in error of an agreement to lease to defendant in error a certain mining claim. The complaint sets forth the dissolution of a co-partnership between plaintiff and defendant and it appears therefrom that as a part of the agreement of dissolution, defendant promised to lease to plaintiff the mining claim in question, which was not partnership prop-

erty and not directly involved as a part of the partnership assets. The claim was the individual property of the defendant and his agreement to lease it to plaintiff was a part of the plan of settlement between the partners. The defendant did not carry out his agreement to lease the claim. Plaintiff did all that he agreed to do under the contract of dissolution of the partnership.

In his answer defendant denied that he ever agreed to lease the claim to plaintiff. The case was tried before a jury and a verdict rendered in favor of plaintiff and against defendant for the sum of $2000 damages. Necessarily the jury found that defendant did agree to make the lease of the claim and the damages were determined presumably upon a reasonable basis by the jury.

Defendant did not testify at the trial and introduced no evidence whatever to rebut the testimony of plaintiff and his witnesses to the effect that there was in fact an agreement made by defendant to lease the claim to plaintiff. The finding of the jury upon this question must be taken as final and indeed it is not seriously questioned, but the main question is as to the proper rule of damages applicable to the case. Thirty-nine errors are assigned to the instructions of the Court below and to the admission and rejection of testimony. The alleged errors are not specifically discussed by defendant in his brief but counsel has classified them under two headings involving the question of fact as to the nature of the contract

alleged to have been broken, and the question of law as to the proper method of measuring damages for the breach of a contract to lease a mining claim.

The Facts.

There can be no serious dispute about the facts of the case at bar as there is practically no conflict in the evidence except as to matters of opinion such as the cost of working the claim, where we may expect that witnesses will not be in full accord. The story of the case as set forth in defendant's brief is fairly satisfactory and there is no need of a further summary of the facts, except that since counsel is in doubt as to what the contract really was which defendant "breached" we think plaintiff's testimony on that point should be set forth in his own words. "* * * he says to me, 'I will give you a lay. "'I will make you out a lease also on the Metson "'Bench'. I agreed to that. * * * he would "give me a lease or make out a lease to me of the "Metson Bench later, to which I agreed. He never "did make the lease. I asked him for a lease on "the south half of the Metson Bench. Kjelsberg said "he would give it to me before he went out * * *. "He said * * * 'I will leave a letter with Gene for "'him to make out a lease for you.' He said 'I "'will have him make out a lease for you. * * * "The terms of the lease were that the royalty was "to be 40% and the lease to run to the middle of

" June, 1906. It was to commence the first of Sep-
" tember, 1905" (Trans. pp. 29-30). " * * * Yes
" sir, he certainly agreed to give me a lease like
" that. * * * No sir, but he told me at the time
" when I signed the receipt, when I inquired in re-
" gard to this lease, he said: 'I will give you a lay.'
" He said, 'I will leave a letter to Gene Chilberg to
" ' give you a lay, to execute a lease to you'. * * *
" Well, when I spoke to Mr. Orton, Mr. Orton
" brought me out on the question about an oral lease.
" I had reference to an oral agreement to give a
" lease; I never considered that I had a lease; that a
" lease had been given to me; that is the way I took
" it, was that Mr. Kjelsberg by words would give me
" a lease" (Trans. p. 87).

Argument in Reply.

I.

THE ACTION IS NOT ONE FOR BREACH OF THE TERMS OF A LEASE BETWEEN A LESSOR AND A LESSEE, BUT IT IS AN ACTION AT LAW FOR THE BREACH OF THE TERMS OF AN AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT, WHEREIN AND WHEREBY DEFENDANT AGREED WITH PLAINTIFF THAT HE WOULD GIVE TO PLAINTIFF A LEASEHOLD ESTATE OR LAY IN A DEFINITELY DESCRIBED MINING CLAIM FOR A DEFINITE PERIOD OF TIME UPON A DEFINITE RENTAL.

Counsel in his brief says in effect that there are two main points upon which the appeal is based; first, that the contract as alleged was not proved and

that the assumption that it was proved impregnated the instructions of the Court and led to error; second, the adoption by the Court of the wrong measure of damages, which also entered into the entire theory on which the case was tried, to the prejudice of the defendant's rights. We shall take these points up in the order laid out by defendant in his brief.

I.

It was to be expected that plaintiff under cross-examination would endeavor to state his agreement with defendant in many different ways. When asked the leading question as to whether he had not a lease, he replied that he "had no object in going to work " under a lease until it was in writing. I was not " ready; I was not aware that I had to go to work " until I was ready, even if I had a lease" (Trans. p. 34). At another point in his testimony plaintiff explained this statement and made it clear that he did not in fact have a lease oral or written, but that defendant had agreed to give him one.

The lease or lay which defendant had agreed to give plaintiff was definite as to its terms. The parties lessor and lessee were definitely proposed. There is no contention but that the claim proposed to be let was known. The period for which the lease was to run or rather the *term* of the lease was from September 1st, 1905, to June (middle), 1906 (Trans. p. 30). There can be no objection to the term as being lacking in definiteness because both points of time can

be ascertained. The terms of payment from lessee to lessor were equally definite, to-wit, a royalty of 40% of the gold taken out (Trans. p. 30). What is there lacking in the "terms, time given and conditions" of this lease or lay as testified to by plaintiff? We ask as to what more parties can do in trying to specify what a lease or lay shall be on a mining claim. If the jury believed that plaintiff was telling the truth as their verdict seems to indicate, then we have a clear, definite statement as to the contract or lay which defendant proposed to enter into with plaintiff concerning the Metson Bench. There is a broad distinction between an agreement to enter into a lease or lay and the actual entering into such a lease or lay. Plaintiff's testimony was clear upon the point. He told how he tried to get the lease and failed. He expected the lease to be evidenced by a writing. Whether or not he knew that a valid lease orally could be made for a period not exceeding a year is beside the point.

We are not advised as to why defendant did not at the time of the dissolution of partnership actually execute the lease with plaintiff. The defendant could possibly speak upon this question. Possibly he was waiting for another lease to expire. He may not have legally qualified, because of defects in title to make the lease. A contract to make a lease is a different thing from the lease itself. While we may not be advised as to why the lease was not actually made, there is no justification from that circum-

stance in assuming that plaintiff does not speak the truth or is confused when he says that a lease *was not* executed, but defendant promised to execute a lease or lay later.

There is an equally broad distinction between the breach of the terms of an agreement to make a lease or lay, and the breach of an *agreement of lease* itself. After a lease is executed and the lessee or layman is let into possession, a breach of the agreement by ouster may occur. Before the lease is executed the proposed lessee or contractee is not let into possession and hence cannot be ousted.

The real distinction between breach of a lease and breach of an agreement to lease becomes more apparent when we study the rules governing the measure of damages for breach in either case. The real reason for setting up the theory that after all plaintiff proved only the case of a breach of a lease, lies in the fact as suggested by counsel that since plaintiff never sought possession under his alleged lease, he cannot be heard to complain. We fail to understand how the facts can be twisted to fit counsel's theory that after all there is only an assumption of proof of the contract alleged. How can counsel discuss the "inherent improbability" of plaintiff's testimony in face of the verdict of the jury? The jury must have believed that there was an agreement to lease. It matters not whether the proposed lease or lay was to be in writing. The writing was not the lease itself but only evidence of it.

II.

THE PROPER MEASURE OF DAMAGES FOR THE BREACH OF THE CONTRACT TO LEASE SET FORTH IN PLAINTIFF'S COMPLAINT AND PROVED AT THE TRIAL, WAS THE NET PROFITS WHICH WOULD HAVE BEEN DERIVED BY PLAINTIFF FROM THE PREMISES AGREED TO BE LEASED FOR THE FULL PERIOD OF THE TERM FOR WHICH THE PREMISES WERE AGREED TO BE LEASED.

There is no question but that the theory adopted by the Court in giving instructions to the jury and in ruling upon the evidence was as set forth herein. Counsel in his brief contends that the true measure of damages in any case of a breach of a contract to lease real property is the reasonable market value of the proposed lease at the time of the breach. We do not dispute the proposition that this is a proper rule for measuring damages in an ordinary case of a breach of a contract to lease real property. A lease of real property would under ordinary circumstances have a more or less definite market value which could be determined by comparing the real property in question with other properties of like character in the neighborhood. Thus the breach of a contract to lease agricultural lands would be undoubtedly the reasonable market value of the proposed leasehold estate, and that value could be determined by the rental value of like lots of like property in the general locality where the property was situated.

In the case at bar, however, while we speak of the right to work a mining property as a leasehold estate, and while there can be no objection to that ter-

minology, we think that the ordinary phraseology adopted by miners more aptly expresses the idea. A lease of a mine is more aptly named a lay. The difference between a lease of mining property and a lease of agricultural property is that during the lease or lay in one case the property may be entirely worked out so that thereafter it is practically valueless, while in the case of agricultural lands the property may be returned to the owner at the end of the lease in as good or even better shape than it was at the commencement of the lease.

The value of a lease or lay of mining property is the amount of gold in the property and which can be extracted less the cost of extraction and the amount to be paid as royalty. We cannot understand how there can be a better measure of damages proposed than a determination by working the property, of the amount of gold that can be extracted less the cost of extraction and the royalty to be paid. If there is a breach of a contract to lease a mining property and if the owner actually lets a lay to another upon the property and if it is worked in a miner-like way and in such a way as it would have been worked by the original contractee if he had procured the lease, then certainly the gold taken out less the cost of extraction and the royalty paid would be the amount in loss which the original contractee had suffered by reason of the failure of the lessor to lease him the property.

In the case at bar it would have been practically impossible to prove that the leasehold estate of the character proposed to be granted to plaintiff, had any market value whatever at the time of the breach. The testimony, however, shows conclusively that the proposed lease or lay was of some value to plaintiff at the time of the breach. It would be a foolish rule of law which would prevent plaintiff from showing with a remarkable degree of certainty what he lost by a failure on the part of the defendant to carry out the terms of his agreement and to compel plaintiff to attempt to prove the market value of the proposed lay at the time of the breach. There can be no question but that the amount of plaintiff's loss can be specifically determined from the testimony. Why then should we seek to apply a rule for the determination of the loss which cannot possibly under the facts and circumstances of this case be of any use to the Court in determining the actual loss suffered by plaintiff by reason of this particular breach of the contract?

Counsel cites Jones on Landlords and Tenants, Section 140. We do not dispute the proposition stated in the said section, but we do insist that this particular measure of damages is not exclusive and should not take the place of a more reasonable rule.

The case of Cilley v. Hawkins, 48 Ill. 308, states the ordinary rule for the measure of damages. The lease was one upon agricultural lands and the opinion sets forth that imaginary or remote profits can-

not be taken as the true measure of damages for the breach of an agreement to lease.

We cite from the opinion as follows:

> "Plaintiff in error asked a number of questions in reference to what could have been made on the farm during the continuance of the term, and what was the damage in not getting the farm to cultivate, and the value of the teams, etc., to have been furnished by defendant in error, and the use of the place for cultivation and pasturage, etc. All of these questions were in their nature speculative, and could not have been answered except upon supposing that facts would exist which might never occur. They would all depend upon a variety of circumstances which might never exist, such as the season, mode of culture, and other contingencies of the occurrence of which no one could tell. Had the evidence been admitted, it would have been based on mere conjecture, and the jury, in considering it, would have been compelled to proceed upon mere supposition. It would not have tended to evolve truth, or to the solution of the issues as to damages."

We can well understand why a person suing another for damages for a breach of a contract to lease should not be permitted to recover prospective profits which he might expect to make incidentally by and through the proposed leasehold estate. For example, if a man intended to go into the grocery business and made an agreement to lease a piece of property which the contractee refused to carry out, it would appear that under the facts of the supposed case the grocer could not recover from his contractee profits

which he might have made with the grocery business on the property. In running a grocery business market conditions, skill in management and other factors not necessarily connected with the leasehold estate, would enter into the problem of profits and leave the matter entirely one of conjecture. However, this is different from the case of a mining property such as is involved in the case at bar. The amount of gold in the mine could not be changed and remains the same irrespective of questions of management or control. The only uncertain factor is as to the means employed in extracting the gold. One man might employ such expensive processes and might work the ground so negligently and carelessly that there would be no profits, whereas, another man might make a profit from the gold taken out.

In the case at bar, however, we call particular attention to the fact that evidence was introduced to show that the mine had been worked in a careful and miner-like manner. The only witness who testified for the defendant said that it would cost about 45% of the gross output to work the ground, and that there was actually taken out of the claim in the case at bar from $15,000 to $20,000 (Trans. pages 90 and 91).

In arriving at the sum of $2000.00 as the amount of plaintiff's damages, the jury must have been guided largely by the testimony of defendant's witness as to the cost of extracting the ore. If we concede then in accordance with the testimony of a wit-

ness produced by the defendant that it cost forty to forty-five per cent of the gross amount of gold taken out to extract the gold, we submit that the only uncertain factor in the problem of determining the amount of damage which plaintiff suffered is made certain. We know that if plaintiff had mined the property in the same way in which it was actually mined, which also seems to have been the proper way to work it, he would have taken out about twenty thousand dollars. He would have paid a royalty of forty per cent, leaving him twenty per cent of the gold taken out as profit. Even assuming that only $15,000 was taken out, plaintiff's damage would have been $3,000. We therefore submit that the jury found a reasonable amount of damages under the testimony and applied the rule of damages given to them by the Court and we submit further that the rule as stated by the Court is reasonable and just.

Counsel complains also because objection was sustained to the questions put to witness Berger relative to his opinion as to the value of the lease at the time the lease was given to him, Berger. It appears from the testimony that the defendant gave to Berger a lease of the same ground involved in the case at bar for the same period and under the same general terms. In the absence of better evidence as to the value of the lease it is possible that if the property had not been actually worked, there would be no way of proving value except in the manner suggested by counsel's questions put to witness Berger, but we

submit that Berger himself was in possession of better proof as to the value of the lease than his mere opinion as an expert. Berger knew how much gold had been taken out approximately from the claim in question, and also knew the cost of extraction. It seems to us that the whole body of law would be brought into contempt if the plaintiff should be put to the struggle of showing by expert testimony the value of the lay of the mine if its value had been demonstrated to a mathematical certainty by actual operation. Where the mine had been uncovered as in the case at bar and at the trial it was possible to show approximately what the mine produced, together with the cost of production, we repeat that it would be absurd to drive plaintiff to a rule for the measure of damages which would prevent him showing the actual damages with remarkable clearness and certainty.

III.

THE COURT DID NOT INSTRUCT THE JURY IN THIS CASE TO FIND FOR THE PLAINTIFF FOR ANY AMOUNT.

We think that counsel is entirely mistaken in placing the construction which he places on a part of the instructions of the Court found on page 99 of the transcript. In the first place we must remember that the instructions of the Court as given on pages 94 to 101 of the transcript were not numbered, and while the instructions are paragraphed, the sub-

stance of each instruction is not set forth as a unit. The preceding paragraph of the instruction concerning which counsel complains is as follows:

> "And the Court further instructs the jury with a view of stating the same thoughts which are embodied in the instruction just given in form somewhat more concrete, that if they find from the evidence that the defendant during the fall of 1905 entered into an agreement with the plaintiff wherein and whereby he promised and agreed to make and execute a lease to the plaintiff of the south half of the Metson Bench, in the Cape Nome Recording District, of Alaska, for the fall and winter mining seasons of 1905-1906, and up to the 15th day of June, 1906, or up to the time that the dumps that might be taken from said property could be sluiced up; and you further find from the evidence that the defendant leased the same premises to another covering the same period of time, and you further find with reasonable certainty that plaintiff, if he had been given a lease would have mined the ground at a profit, you should find for the plaintiff and the plaintiff's measure of damages in that event, is the profit which you shall find from the evidence, he would have made if the lease agreed upon had been fully performed by him.
>
> "You are instructed in this case to find for the plaintiff for some amount; that amount to be filled in in the form of verdict which I send out with you to your jury room."

A reading of all the instructions, and especially the paragraph quoted above will show we think that when the Court used the expression "you are in- " structed in this case to find for the plaintiff for " some amount", the expression "in this case" did

not mean in the case at bar, but meant "in that event", referring to the supposititious case which the Court set forth in the preceding paragraph quoted. In other words, the Court said in effect to the jury that if they found from the evidence that the defendant entered into an agreement to lease the property, and if they further found that the plaintiff leased the same ground to another person for the same time, and if they found that if the plaintiff had been given the lease he would have mined the ground at a profit, the jury should find for the plaintiff and that the plaintiff's measure of damages would be the profit he would have made.

After stating the case with the liberal use of "ifs", the Court in the next paragraph says: "You are "instructed in this case to find for the plaintiff for "some amount." The expression "in this case" means "in this event". We submit that if the interpretation put upon this particular paragraph of the instructions by counsel is correct, then all the previous instructions of the Court become practically meaningless. For example, what would be the meaning of this expression of the Court found on page 98 of the transcript?

> "The Court instructs the jury that if you find from the evidence that pay dirt and gravel has been mined from said premises agreed to be leased to the plaintiff (if you find such an agreement existed), * * *"

Why should the Court instruct the jury to find for the plaintiff in any amount when the Court had

taken such pains to say "if you find such an agree-" ment existed"? We deem it exceedingly unfortunate that counsel for both plaintiff and defendant were not present at the trial, but we venture to say that if counsel will read the instructions all through and place the proper emphasis on the paragraph in question, he will be convinced that the Court used the said paragraph with reference to the preceding paragraph, as no other interpretation is intelligible in view of the previous instructions of the Court upon this point.

We also call attention to the instruction on page 97 of the transcript:

> "If you find from the preponderance of the evidence that the defendant agreed with the plaintiff to make and execute to him a lease * * *"

It is unbelievable that after giving the jury full instructions the Court should then in effect tell them that the only question before them was the amount of damages.

It might be argued that defendant was in no way damaged by the instructions even if we assume that the Court intended the instruction as counsel has interpreted it. Defendant introduced no evidence to dispute the testimony of plaintiff to the effect that the agreement as pleaded by him was actually made. It is true that the verified answer of defendant denying the making of the alleged agreement was on file and the burden of proof was upon the plaintiff.

Since the testimony was all to the effect that the agreement as pleaded was in fact made, we do not see that in any event defendant would suffer much damage, if at all, by the instruction complained of, but we submit that no such instruction was in fact given.

IV.

THE NET PROFITS ARISING ACTUALLY FROM THE MINING OF THE CLAIM IN DISPUTE PRESENT THE PROPER MEASURE OF DAMAGES FOR BREACH OF THE CONTRACT, AS ALLEGED IN THE COMPLAINT AND THEREFORE SPECIFICATIONS OF ERROR 3, 4, AND 5, ARE NOT WELL TAKEN.

Defendant contends in his brief that the profits which actually accrued from the working of the south half of the claim in question were remote, speculative, and contingent. There is considerable testimony upon the manner in which the claim was actually worked, by witness Anderson and witness Berger. It was a question of fact as to whether or not the method employed in working the ground was the most satisfactory to produce the best results, and it was likewise a question of fact as to whether or not $20,000 in gold was taken from the south half of the claim. It is true that witness Anderson made an estimate, but his estimate was based upon the panning which he did as the work of taking out the dirt progressed. The instructions of the Court were given to the jury in view of the testimony, which showed that the claim had been worked by

Berger and Anderson as partners in the enterprise. It is of no use to speculate as to whether or not it would have cost Berger more to work the claim alone, because as we have already shown the verdict of the jury is sustainable, even upon the theory that it would cost 40 or 45% of the gross amount of gold taken out to work the claim as testified to by Berger.

Counsel cites Smith v. Ubanks, 72 Georgia 280, decided in 1884.

The facts of this case show that it was an action for breach of a lease of real estate, to be used for a grocery store, blacksmith's shop, wagon yard, and so forth, and the admission of evidence as to the probable profits which could be made under the circumstances was properly considered error.

We confess that we fail to follow counsel in his reasoning, that a mining property presents a worse case than the case above cited or even a comparable case for the application of the rule as to profits.

As has been already pointed out, if we know approximately the total amount of gold which actually was taken from the ground, we can estimate very nearly the cost of extraction of the gold, and determine the net profits. The net profits are not remote or speculative in any sense of the word; but as we have already shown in running a grocery store, blacksmith's shop, wagon yard and so forth the profits from such an enterprise would be exceedingly hard to determine.

Shoemaker v. Acker, 116 Cal. 239 (decided in 1897).

THE FACTS.

Action for damages for breach of contract.

Plaintiff had charge of defendant's lemon orchard for share of profits. Defendant claimed breach of contract by plaintiff on account of brief absence from the place. Plaintiff elected to consider contract rescinded and sued defendant for damages, based on probable profits for the remainder of the time limited in contract.

THE LAW.

"'Prospective profits', as damages, present one of the most difficult subjects with which Courts have to deal. It is not the law, however, that they can never be recovered; our own Code states the rule to be that the measure of damages for the breach of a contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which *in the ordinary course of things would be likely* to result therefrom'. (Civil Code, sec. 3300.) An examination of the authorities will show that the cases in which the future profits were rejected as 'speculative', or 'too remote' were cases where the asserted future profits were entirely collateral to the subject matter of the contract, and not consequence flowing in a direct line from the breach of such contract. Familiar instances of profits which are thus speculative and remote are those which might have been realized on a new contract with a third person which could have been consummated with the proceeds of the contract sued on if the latter had not been broken; for in such a case the profits on the new

contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on. But where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract cannot wholly escape an account of the difficulty which his own wrong has produced by devising a perfect measure of damages (Sutherland on Damages, 2nd Ed., secs. 64, 72, 107, 120; Masterton vs. Mayor, 7 Hill 61; 42 Am. Dec. 38; United States vs. Behan, 110 W. S. 344; Rice vs. Whitmore, 74 Cal. 619; Hale vs. Trout, 35 Cal. 229; Stoddard vs. Treadwell, 26 Cal. 308; Cederberg vs. Robison, 100 Cal. 98; Taboe Ice Co. vs. Union Ice Co., 109 Cal. 242).

"In Sutherland on damages Section 64, the author after speaking of profits which are *too* remote, says—quoting from a decided case. 'But profits or advantages which are the direct or immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.'"

Cederberg v. Robison, 100 Cal. 93.

This was an action for breach of contract to employ plaintiff to harvest certain grain. The Court in its opinion says:

"The profits and losses must be determined according to the circumstances of the case and

the subject matter of the contract. * * * The difficulty in any case is not to determine whether the loss of profits on his contract constitutes part of his damage, *as the cases all admit that this is an element which enters into his damage,* but to determine what portion of the profits he has lost by the breach of his contract. * * * *The Court before which the case was tried approved the verdict by its action in denying a new trial, and the burden is upon appellant to show that error has been committed.* It is not sufficient to say that the jury might have found otherwise, or that a verdict for a less amount would have been consistent with the evidence. It must appear from the evidence itself that the verdict cannot be sustained."

Rice v. Whitmore, 74 Cal. 619.

In an action by a lessee of farming lands for a breach of covenant in the lease to be let into possession, the Court at the request of plaintiff instructed the jury in effect, that the plaintiff was entitled to recover the value of the crop that might have been raised on the land by an average farmer during the term, less the cost of raising it.

Counsel cites Rhodes v. Baird, 16 Ohio State, 573.

The facts of this case show that in estimating damages plaintiff was permitted to show by witnesses, the average life of a peach orchard, the average number of crops, and the average price of peaches for past 15 years, thereby deducing the average value per tree.

Under this state of facts, the Court in addition to using the language which counsel has quoted, stated as follows:

> "In cases where the damages may be estimated in a variety of ways, that mode should be adopted which is most definite and certain. * * * The profits testified to in the present case were remote and contingent, depending upon the character of the future seasons and markets, and a variety of other causes of no certain or uniform operation."

We see indicated in the opinion in this case the principle for which we are contending. Surely the Court in the case at bar has adopted the way for estimating damages which is most definite and certain. It is perfectly obvious that the testimony in the case cited as to damages was remote, uncertain and impossible of exact determination. In the case at bar it was not possible that the amount of gold taken out could be increased or decreased by seasons or markets, and the cost of extraction was capable of reasonably certain determination.

In the case of Central Coke Co. v. Hartman, 111 Federal, 96, we think the significant part of the opinion is as follows:

> "Hence the general rule that the expected profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss. * * * He who is prevented from embarking in a new business, can recover no profits, because there are no probable

> data of past business, from which the fact that anticipated profits would have been realized, can be legally deduced."

We cannot understand how working a mining claim can be likened to the doing of a commercial business. We do not close our eyes to the uncertainty involved in working a mining claim, but we do not think that because mining is uncertain as to results, that in principle mining can be compared with a mercantile business, as we have before suggested. The gross amount of gold in a mine is as fixed as the North Star. Whether or not the mine will pay, may be determined by the manner in which it is worked, but generally the gross amount of gold is the determining feature. One factor in the problem is certain, and so far as the cost of extraction is concerned we do not see how that can be compared with any feature that enters into a mercantile business; while, of course, the gross amount of sales in a mercantile business is never a fixed quantity, and is often most uncertain. After a mine has been worked, as we have before suggested, it seems foolish to compare it to a mercantile business.

The error which counsel makes is in arguing that plaintiff must recover his damages, limiting himself to testimony which might have been produced at the date of the breach of the alleged contract, without regard to the fact that the mine was afterwards worked, and its value as a mine determined. In the

case of a mercantile business where a breach of contract occurs no such basis of computation is given as in the case of a mining property worked and developed just as it would have been worked and developed if there had been no breach of the original contract.

We submit, therefore, that plaintiff proved the execution of a contract to lease the claim in question, existing between plaintiff and defendant; that there was a breach of the contract committed by defendant; that plaintiff lost as a result of said breach, the amount of gold net, which he could have taken out of the property during the time specified in the proposed lease; that the said amount has been fixed by the verdict of the jury; that no error in the instructions of the Court or in the admission or rejection of evidence is shown; and that the judgment of the lower Court should be affirmed.

Respectfully submitted,

ALBERT H. ELLIOT,
WM. H. PACKWOOD,
Attorneys for Defendant in Error.

No. 1716.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAGNUS KJELSBERG,

Plaintiff in Error,

vs.

B. A. CHILBERG,

Defendant in Error.

Reply Brief and Oral Argument of W. H. Metson, Esq.

THE JAMES H. BARRY CO.
1122-1124 MISSION ST.

IN THE

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MAGNUS KJELSBERG,
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Defendant in Error.

No. 1716.

REPLY BRIEF AND ORAL ARGUMENT OF W. H. METSON, ESQ.

MR. METSON: The case of *Kjelsberg* vs. *Chilberg* involves a mining claim near Nome, Alaska, and grew out of this state of facts:

The litigants were engaged as partners in the saloon business in Nome. Magnus Kjelsberg, the plaintiff in error, was the owner of this mining claim, the Metson Bench, and Mr. Chilberg claimed that, as one of the conditions of dissolving the partnership, Mr. Kjelsberg was to give him a lease for the year 1905 on the lower or southerly half of the mining claim split in the manner I have indicated on the blackboard there. The

claim runs east and west. Mr. Chilberg claimed that he was to have the southerly half of it, which would split it longitudinally along the length of the claim. The agent of Kjelsberg (who was also a nephew of the defendant in error, Chilberg) afterwards made a lease of this ground under a letter of instructions from Kjelsberg, to a man named Berger.

Chilberg claims damages by reason of his failure to get the lease. That is the situation as we understand it. Unfortunately when the case came on for trial, Mr. Kjelsberg was not in Alaska,[1] and therefore his testimony was not taken.

The first point we make is that the contract of lease, as testified to by Chilberg at the trial, would fix a lease of such indeterminate qualities as to time and other conditions that no lease could have been made in law under the doctrine that "if any of the conditions to be con-
" tained in the lease were left indefinite and to be fixed
" only when the lease should be prepared, there was no
" such contract as was binding on the parties at law;
" whatever may have been the probability that the par-
" ties would not ultimately disagree upon the form of
" the lease, or however unimportant to the lease the
" stipulation omitted to be specified might be regard-
ed." [2] The time of the commencement of the lease was,

[1] Tr., 83.

[2] Sourwine vs. Truscott, 17 Hun., 432, 437;
Clark on Contracts, pp. 62, 38;
Bishop on Contracts, Sec. 319;
Law vs. Pemberton, 31 N. Y. S., 21.

according to Chilberg, not agreed upon (Tr., 38), nor was the time definite as to the ending of the lease (Tr., 34). Of course there were various other conditions which could have entered into the lease which he does not mention at all, such as the method of working the ground, the number of men to be employed, the number of shifts, and the usual points of agreement with reference to leases of that character.

One of the other main points upon which we look for reversal is this instruction:

> "You are instructed in this case to find for the plaintiff for some amount." [3]

The complaint was specific with reference to the alleged agreement to lease, and it was specifically denied (Tr., 10). The testimony at the trial controverted the issues. Notwithstanding this fact, the trial judge instructed the jury that they must find for the plaintiff. In other words, determining that damages were due to defendant in error under the proofs offered, and that therefore the jury must bring in a verdict for some amount at least for the plaintiff. Undoubtedly that instruction is more than sufficient to reverse the case, and we have cited a number of authorities covering the point. [4]

The other points bear upon the erroneous admission

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[3] Spec. of Error VII.

[4] Brief, pp. 43-47.

of testimony and also on the instructions to the jury upon the question of profits.

The Court instructed the jury: [5]

> "That the rule of law is that where the lessor has title and for any reason refuses to lease the premises agreed upon as required by the terms of an agreement to lease, he shall respond in damages and make good to the lessee, whatever he may have lost by reason of his bargain."

It is possible that an instruction of that kind would be good as an abstract proposition of law.

The Court further instructed the jury:

> "So far as money can do it, the lessee must be placed in the same situation with regard to damages as if the contract had been specifically performed; that is to say, that a party having entered into such an agreement with another, would be entitled to such profits as would have been derived from the premises agreed to be leased for the full period of the term for which the premises were agreed to be leased."

That, too, as an abstract proposition of law might have been correct, but it was not sufficient under the conditions of this case.

The true rule with reference to the introduction of testimony and with reference to the measure of dam-

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[5] Tr., 98.

ages in this case is, as we take it, laid down in *Jones on Landlord and Tenant,* Sec. 140, where he says:

> "When an owner of premises refuses to carry out his agreement to grant a leasehold estate and the other contracting party resorts to an action at law to recover compensation for the loss entailed, by the breach of the contract, *the measure of damages is the value of the contemplated leasehold estate in the open market minus the rent reserved."*

That was the theory upon which the defense endeavored to try the case: that the rule of damages should be pointed to the breach, granting that there was a breach of the contract. The defendant endeavored to draw from the witnesses the damage that would have accrued to Chilberg at the time the contract was breached; but the Court refused to permit us to show the value of this leasehold on the market at the time of the alleged breach, while at the same time permitting plaintiff to show what the value of surrounding claims were (Tr., 67, 68, 69, 70, 71), Assignment of Error XXV. The jury were therefore allowed to form an erroneous deduction from such testimony, which we were not permitted to correct by showing the real value of the claim on the market.

The only grounds upon which the Court could have based the allowance of the testimony complained of was that it indicated the rental value of the claim. At the same time it instructed the jury that the measure of

plaintiff's damage was the amount of profits he might have made if he had not been denied the lease. The testimony was the basis of one measure of damages, the instruction was based on another, both conflicting, and both the testimony and the instruction were adverse to the defendant. If the jury were to ascertain the value of the lease from the value of surrounding claims, the reason for the introduction of the testimony (Tr., 69), how can they be said to have been limited to a determination of its value from the amount of profits that might have been made from the ground had plaintiff been given the lease?

We submit that the allowance of this testimony, as well as the instruction complained of, should reverse the case.

The case was tried upon the theory that the profits accruing to one Berger, to whom a lease was afterwards given of the ground, was the measure of damages to Chilberg; that such profits would fix the profits that would have accrued to Chilberg if he had been given the lease. Berger had gone upon the property, and taken out gold dust during the winter, and the Court held the value of the gold dust taken out by Berger was the measure of damages to be applied in the case.

I submit that this is contrary to the general rule with reference to personal property and also with reference to real property. The damage in reference to personal property is the market value of the goods whether destroyed by fire, by malicious destruction, or in some

other way; or for a failure to deliver personal property the measure of damage is the value at the time of the failure to deliver.[6] It is not some speculative profit that might have been made upon the property. And this same rule is applicable to real property.[7]

The only exception to the rule is with reference to an established business. Then evidence, by way of illustrating to the jury or to the Court what *past* profits have been made in the business, may be submitted to the jury for the purpose of determining the damages.[8] But evidence as to something that has taken place after the breach cannot be introduced, the ground of refusal being that such evidence would be speculative in the extreme. The Court in this case allowed evidence of acts done upon this mining property *after* the breach of agreement had occurred, by a miner of long experience in the country, to be taken as evidence of the profits that might have been made by Mr. Chilberg (whose occupation was that of a saloon-keeper) upon this specific piece of ground. Not only that, may it please the Court: the evidence went further than that. The northerly half of this property had already been leased

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6 "So long as the contract is open and the action as it necessarily must be, and as in this case it is, is brought upon it, the sum recoverable is the value of the thing stipulated, at the time when, and the place where, it should have been performed." Wells vs. Abernethy, 5 Conn., 227. Cases cited.

7 Id.

8 Coke Co. vs. Hartman, 111 Fed., 96;
Kenny vs. Collier, 79 Ga., 746-7;
Consumers' Ice Co. vs. Jenkins, 58 Ill. App., 525.

to another very good miner, a man of experience from 1899 in that particular section, Anderson, who had worked other ground in the immediate vicinity, and who had an idea that the gold was on the northerly half of this ground; Berger, who had worked ground all around this and had been mining there since 1898 in that section, took the southerly half of it. They both put down holes, and without any very good results. Finally they concluded that the cost of running one camp would be less than two, and the whole claim could be operated cheaper and more effectively if they joined forces. So they combined their respective camps, plants and knowledge, and went to work upon the ground and worked the northerly half and the southerly half in common.

They sunk shafts on the easterly end there at the points marked with squares, and connected them by drifts. Then they advanced the faces of their stopes to the west underground, and took out the dumps and combined the material extracted from the stopes on the northerly half and from the stopes on the southerly half into the dumps. It would therefore be impossible, I think, even with grab samples, to determine from the admixture of the material from the north half and the south half, except by the greatest kind of speculation or conjecture, what was the profit on the material from the north half (which was admittedly much the richer and carried more values), as compared with the material taken from the south half. Berger stated that if he

had had the southerly half alone, he would probably have "broken out even" after paying a royalty; Anderson, on the other hand, took a more optimistic view of the situation, and said they might have possibly taken out $20,000 in gross from the lower half, from which would have to be deducted the expenses and the royalty. With this condition of affairs, I most respectfully submit that the Court below was in error in not allowing the defense to show what the true rule was.

Berger and Anderson were about at the point of giving up the ground on the southerly part, it was running so low in values. The average of the whole dump went from five to six cents to the pan after they had worked it out, so that even if they had panned every part of it, I think the Court has had enough experience to know that it would be impossible to tell from the admixture what should be estimated as from the southerly and what from the northerly half. They were putting in evidence of profits not only of the land on the south side (the only evidence admissible, if at all), but also the profits of the land on the north side, for the purpose of fixing the damages accruing to Mr. Chilberg at the time the lease was breached.

In the case of *Smith* vs. *Eubanks,* 72 Ga., 280, a proposition analogous to this is discussed. With reference to a charge somewhat similar to the present one, it is said:

> "This charge is error. What other parties in possession made afterwards is no basis for recovery by

> plaintiff. The successors of plaintiff may have been more popular and thus have made customers. They may have managed better, and made more money. They may have been men of better habits, more prudent and successful business men, more accustomed to this sort of business, and in these and many other ways the business may have been more profitable with them than in the hands of the plaintiff. Therefore, to base plaintiff's prospective profit on their success would be far from a just rule by which to measure damages sustained by them for their eviction. . . . To make the profits of successors the measure of how much plaintiffs could have made if not evicted, and thus the measure of their damages would not be in accordance with law or reason."

So it is here. A large company with a good manager could work ground that a poor man could not touch; they could prospect it with a certain kind of machinery which would produce results; they could handle a volume of material upon which a small profit would give a good compensation at the end of the year. A poor man could not put in the machinery and could not prospect his property in such a way. On the other hand, a good company with a poor manager could lose money just about as fast as the Mint could supply it, without developing the values in the ground.

The pay on these claims was not struck until March, 1906, months and months after Berger and Anderson went to work there. They were good miners. This other man was a saloon man and evidently without the

experience necessary to skilfully mine the ground, and it would be a pure question of luck whether he ever got any profits out of this ground, which upon the surface bore no earmarks of what was contained below.

Therefore, we contend that the true rule of damages should be fixed to the time of the alleged breach; that is the rule generally and there should be no exception here. As was said by the Circuit Court of Appeals for the Eighth Circuit,[9] illustrating what I mentioned a moment ago:

> "He who is prevented from embarking in a new business can recover no profits, because there are no *provable data of past business* from which the fact that anticipated profits would have been realized can be legally deduced."

That is the only exception to the rule.

I thank your Honors.

In closing:

If the Court please, it is a well known fact that lays on mining claims are sold in the open market just the same as leases on other real property are sold in San Francisco.

I can see no legal distinction between a lay of a mining claim and a lease of a piece of property on Market street.

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[9] 111 Fed., 96.

Legally, I can not see why any different rule of damages should be applied as between a lease upon a peach orchard on the Sacramento River, for instance, and a mining lease. The prospective profits are even more speculative from the mining lease than from the orchard land, where it is always conjectural whether or not a frost-ball will bound over every other orchard where the peaches are in full blossom, and omit the leased orchard. An instance of this sort happened on the Sacramento River this year, where the whole peach crop on Grand Island, save of one orchard, was destroyed. There was a free market then for the crop from this orchard, and its value was necessarily increased.

In this case no one knew that gold was under this ground; and no one knew that this football of frost was going to jump over one ranch and take all of the other ranches. No one can definitely know the kind of a crop there is going to be on a farm where there are no perennial or deciduous trees. No one can tell whether it is going to take a one-year, or two-year, or three-year lease to rob the soil of all its nutritious properties and leave it absolutely worthless until it has been refertilized. One venture is just as speculative as the other. The rule with reference to farming contracts,[10] with reference to overflowed lands,[11] and with reference to

[10] Rhodes vs. Baird, 16 Ohio State, 573.

[11] City of Chicago vs. Heuerheim, 85 Ill., 594.

peace orchards is just the same as with reference to a mine. A man may dig his shaft and hit the pay streak and he may drift on the edge of the pay streak and yet never find it.

The rule must necessarily be the same. If you are going to make an exception of this case, you will have to make other exceptions and so change the rule of law entirely. The market value of lays or mining leases is just the same as the market value of property on Market street, so far as the proof is concerned. The market value of personal property is the same all the world over.

But to go back to the negotiations for the lease. Counsel says that the date of the commencement of this lease was agreed upon. I call your Honor's attention to page 38 of the transcript. I believe that the witness on direct examination, when led, did say something about the date being the first of September, but on cross-examination he testified that no date was fixed, as follows (Tr., 38):

> "Q. When did you say this lease was to commence when you had this conversation when he says to you, 'You shall have a lease on the Metson Bench' to commence when?
>
> "A. Well, *the date was not stated, when it was to commence.*"

Now with reference to the values of the south half, Berger said (Tr., 91):

> "If I had only a lease upon the southerly portion of it and found the block of pay which I took out, and worked in an economical manner, I would have made just about a 'stand-off.' I might have made a very small profit and there might have been a very small loss."

Anderson, the other witness as to the point of value, says, at page 61:

> "If we had had no other ground to work excepting that part of the south side, I don't think I would know how much it would cost to take the pay out. It depends on how long a man was locating the pay on it."

There are the expressions of two miners with reference to the south half. Counsel calmly ignores the fact of the joint working of the whole claim and proceeds upon the supposition that Mr. Chilberg, a saloon man, would have gone on there in the place of Mr. Berger, and would have made a combination with Anderson and would have extracted the same quantity of gold with the same expense. The Court also proceeded on the same theory. Here is speculation upon speculation, and conjecture upon conjecture; a conclusion that *if* Kjelsberg had given Chilberg the lease and *if* Anderson had taken him into partnership in the same way that he had taken the skilled miner Berger into partnership, that the results would have been the same; that Anderson assisted by a saloonkeeper would have extracted as

much material as Anderson assisted by the skilled miner, Mr. Berger.

Now as to the instruction to bring in a verdict in some amount for the plaintiff, I construe the argument of counsel to mean this: he admits that unless his construction of this instruction is correct, there is admitted error. I am going to *demonstrate* to the Court that upon counsel's statement that is admitted error. While it is true that neither of us was at the trial, still if counsel had read his record more thoroughly he would not have arrived at the conclusion that he has reached, as the error of this instruction was specifically called to the attention of the Court below.

Neither grammatically nor rhetorically is the instruction that counsel has read susceptible of the construction that he places upon it. If your Honors will turn to page 101 of the transcript, you will see that the jury could have received no such construction of this instruction. The record shows the following proceedings:

> "Whereupon, *before* the jury retired to consider on their verdict, the defendant took the following exceptions."

Now, if your Honors will turn to page 104, the following is shown:

> "Defendant excepts to the following instruction given by the Court to the jury:
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> "You are instructed in this case to find for the plaintiff for some amount."

These proceedings tend to show the construction placed upon this instruction in the Court below, and the effort made to have the same corrected by calling it to the attention of the Court before the jury left the jury box to deliberate.

Laying aside all attempt to construe the entire charge and reconcile its various inconsistencies, it is clear that this error was pointed out in the presence of the jury, and they went out with such instruction left uncorrected. The Court, if it had no intention of so charging the jury, should have then and there explained to the jury that such was not the construction to be placed upon the instruction. But no such explanation was made.

In the absence of such explanation the jury were given the impression that the Court believed the defendant had agreed to make the lease in controversy and that it believed the plaintiff was entitled to damages in some amount.

There could be no other conclusion drawn, not alone from the instruction itself, but from the failure of the Court to qualify or explain it when its dubious character was called to its attention.

The natural result was that the jury believed, being so influenced by the Court, that if the defendant's case was false in one part, it was false in all. More credence therefore should be given to the testimony of plaintiff's witness Anderson than to that of Berger, on the point of whether a profit could have been made on

the south half. The testimony of these witnesses was contradictory on the point, and the jury were not left foot-loose, we contend, to accept that of Berger, by reason of the instruction itself and the circumstances surrounding the giving of the same, shown by the record.

Furthermore, the instruction which must necessarily have been considered by the jury in the light of the evidence offered, constituted a double-barreled error. For they were allowed first to consider the value of the surrounding claims in order to estimate the value of the leasehold interest, and then they were told to bring in a verdict for some amount, and to consider the amount of profits that might have been made by Chilberg if he had the lease on the ground. In estimating the damage of plaintiff, and the loss of any profits he would have made on the ground, they necessarily considered the testimony showing that the ground was surrounded by valuable claims. Nothing else could be expected. The defendant, therefore, was injured both ways, while he was not permitted to show what a lay on this ground was actually worth on the market at the time of the breach, even admitting that the fact of the ground being surrounded with valuable claims might be an element in determining its market value.

We submit, if your Honors please, any one of these three errors should reverse the case.